No. 87-1224-ASX
Status: GRANTED

Title: Mark H. Oring, Appellant
v.
State Bar of California

Docketed:
January 22, 1988

Court: Supreme Court of California

Counsel for appellant: Cohen,Theodore A.

Counsel for appellee: Richey Jr.,Truitt A.

NOTE: Notice of Appeal filed 1/7/88 cited

Entry	Date	Note	Proceedings and Orders
1	Jan 22 1988	G	Statement as to jurisdiction filed.
2	Feb 18 1988		Motion of appellee State Bar of California to dismiss or affirm filed.
3	Feb 24 1988		DISTRIBUTED. March 18, 1988
4	Jun 17 1988		REDISTRIBUTED. June 23, 1988
6	Jun 30 1988		PROBABLE JURISDICTION NOTED.
		-	**********
8	Aug 8 1988		Order extending time to file brief of appellant on the merits until August 22, 1988.
9	Aug 17 1988		Record filed.
		*	Certified original record received.
10	Aug 22 1988		Joint appendix filed.
11	Aug 22 1988		Brief of appellant Mark H. Oring filed.
12	Sep 23 1988		Brief of appellee State Bar of California filed.
13	Oct 7 1988		CIRCULATED.
14	Oct 18 1988	D	Application (A88-308) to extend the time to file a reply brief from October 23, 1988 to October 31, 1988, submitted to Justice O'Connor.
15	Oct 18 1988		Application (A88-308) denied by Justice O'Connor.
16	Oct 24 1988		SET FOR ARGUMENT. Tuesday, January 10, 1989. (2nd case) (1 hr.)
17	Oct 24 1988	X	Reply brief of appellant Mark H. Oring filed.
18	Jan 10 1989		ARGUED.
19	Jan 23 1989		Appeal DISMISSED for want of a properly presented federal question. Opinion per curiam.

87-1224

No. _____

Supreme Court, U.S.
FILED
JAN 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

APPEAL FROM A JUDGMENT OF THE CALIFORNIA SUPREME COURT IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

1. Whether, for purposes of lawyer discipline, Rule 2-101 of the Rules of Professional Conduct of the State Bar of California and the Standard promulgated by the Board of Governors of the State Bar pursuant to such rule, which create a presumption that "testimonial" advertising by attorneys is false, misleading or deceptive, violate the Free Speech Clause of the First Amendment of the Constitution of the United States because:

a. they impermissibly shift the burden of proof to the accused attorney to show that the "testimonial" advertising is not false, misleading or deceptive; and

b. as applied, they constitute a "blanket ban" on "testimonial" advertising?

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No. _____

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

vs. *Appellant,*

THE STATE BAR OF CALIFORNIA,

Appellee.

APPEAL FROM A JUDGMENT OF THE CALIFORNIA SUPREME COURT IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

On June 2, 1987, the Review Department of the State Bar of California convened "In the Matter of Mark H. Oring," and resolved as follows:

> "*RESOLVED* that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted."

Four referees voted "NO" on the adoption of such resolution, based upon their belief that the presumption and or Rule 2-101(D) was unconstitutional. A copy of the Minutes of the Review Department are printed in Appendix "A."

This resolution overruled the December 5, 1984, decision of the Hearing Panel of the State Bar Court of California, which unanimously agreed that Appellant was not culpable because Rule 2-101 was unconstitutional. A copy of the panel's findings of fact and recommendation is printed in Appendix "B."

Appellant petitioned the California Supreme Court for a writ of review. On October 28, 1987, the California Supreme Court denied the petition. A copy of the order denying the petition is printed in Appendix "C."

JURISDICTION

This is a disciplinary action brought by the State Bar of California against the Appellant. On June 2,

1987, the Review Department of the State Bar of California resolved that Appellant be publicly reproved. The Supreme Court of the State of California entered its order denying Appellant's petition for writ of review on October 28, 1987, and thus upheld the constitutionality of the California State Bar's Rule of Professional Conduct, 2-101 and the Standard promulgated thereunder.

Appellant filed his notice of appeal with the California Supreme Court on January 7, 1988. A copy of said notice is printed in Appendix "G."

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(2). As in *Lathrop v. Donahue* 367 U.S. 820 (1961), Rule 2-101 and the Standard promulgated by the Board of Governors pursuant to such rule, represent state "statutes," legislative in character, the constitutionality of which appellant has challenged at each stage of the proceedings below. Since Appellant has been penalized for violating these "statutes," jurisdiction by appeal is proper.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law *** abridging the freedom of speech, or of the press *** "

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 2-101 of the Rules of Professional Conduct of the State Bar of California:

Professional employment

This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

(A) A "communication" is a message concerning the availability for professional employment of a member or a member's firm. A "communication" made by or on behalf of a member shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly or by context, that it is a "communication"; or

(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexations or harassing conduct.

(B) No solicitation or "communication" seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or "communication" specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or "communication" is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member's firm to former or present clients, or a member's right to respond to inquiries from potential clients.

(C) A member or member's firm shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or capper, which acts would be in violation of law, or which, if performed by a member of the State Bar, would be in violation of subdivisions (A) or (B) of this rule 2-101.

(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what

"communications" will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

(E) The member shall retain for one year a true and correct copy or recording of any "communication" made by written or electronic media pertaining to the member of the member's firm. Upon written request, the member or the member's firm shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar the evidence of the facts upon which any factual or objective claims contained in the "communication" are based.

Standard adopted by the California State Bar Board of Governors pursuant to Rule 2-101:

"A 'communication' which contains testimonials about or endorsements of a member is presumed to violate Rule 2-101, Rules of Professional Conduct."

STATEMENT OF THE CASE

How The Federal Question Was Raised

During the proceedings in the lower tribunals and again in the Calfifornia Supreme Court, Appellant had properly drawn in question the validity of a state

"statute" on the ground of its being repugnant to the First Amendment of the United States Constitution. Although the lower tribunal held in Appellant's favor, the Review Department of the State Bar of California held in favor of the validity of the state "statute." The Supreme Court of the State of California denied Appellant's petition for writ of review.

Statement Of Facts

Appellant, Mark Oring, and his then partner, David Grey, engaged in a radio advertising program for professional employment which used the following statement of Sharon S.:

> "I was rear ended on the San Diego Freeway and all my medical bills were piling up and the insurance company was giving me a hard time, constantly harassed me, just all in all gave me a bad time. I contacated an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey and Oring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey and Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I would definitely go back to Grey and Oring. I certainly do believe that."

This message was followed by an announcer adding:

> "Grey and Oring. That's G-r-e-y and Oring, a private law firm. If you have an automobile

accident, you need a lawyer. Grey and Oring, 558-8000. There's no charge for consultation. 558-8000."

Although there were no complaints against the advertising, an informal preliminary investigation was held before Referee Jerry Craig on November 10, 1981. Referee Craig made the following determination: (1) the advertisement was a testimonial; (2) Rule 2-101(D) was unconstitutional; (3) the testimonial was not actually misleading; and (4) as such, there were insufficient facts to warrant further proceedings.

The State Bar requested further proceedings from the Board of Governors' Committee on Adjudication and Discipline on the ground that an Investigation Department Referee was not authorized to determine the constitutionality of the Rules of Professional Conduct.

Inasmuch as the State Bar failed to take any action for 20 months, David Grey filed a Petition for Review of State Bar's Action with the Supreme Court of the State of California in or about November, 1983 (LA 31386). On March 28, 1984, that Court issued its order denying the Petition but ordered the State Bar to proceed or dismiss the case. In April, 1984, the State Bar filed a Notice to Show Cause.

On December 5, 1984, a set of Stipulations were entered into between Appellant and Appellee, including the following:

(1) A "Stipulation as to Facts and Disposition" wherein it was stated, at paragraph 4:

"4. The Statements of Sharon S. were extemporaneous and were true and reflected her

actual experience as a client of Grey and Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded."

The disposition agreed to was a public reproval, subject to the second stipulation below. A copy of the "Stipulation as to Facts" is printed in Appendix "D."

(2) A "Stipulation Re: Filing and Force and Effect of 'Stipulation as to Facts and Disposition Etc.' " wherein it was agreed that the Stipulation as to Facts and Disposition would be of no force or effect unless and until a final disciplinary Order was made and entered against Appellant's partner, David Grey. Further, such Stipulation stated that Appellant would not be disciplined if his partner, Grey, was exonerated.

A copy of the "Stipulation Re: Filing and Force and Effect of 'Stipulation as to Facts and Disposition' " is printed in Appendix "E."

On December 5, 1984, a formal hearing was held before three referees, Lloyd Reed, James L. Kellner, and Barry J. Post. The State Bar presented no evidence. Upon consideration of the file, all papers filed on behalf of all parties, and oral argument, the panel unanimously agreed that Appellant was not culpable because Rule 2-101 was unconstitutional. (Appendix "B")

Pursuant to the State Bar's request for review, a hearing was held before the Review Department of the State Bar Court on August 28, 1985. By a vote of 5-4, with three referees abstaining, Standard (2) was held to be constitutional as applied to Appellant's partner,

David Grey, and it was resolved that David Grey be publicly reproved. (Appendix "F")

After the disciplinary order made by the Review Department upon David Grey became final, the 12 member Review Department reconvened In the Matter of Mark H. Oring, and on June 2, 1987, resolved as follows:

> "*RESOLVED* that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted."

Four referees voted "NO" on the adoption of such resolution, based upon their belief that the presumption and or Rule 2-101(D) was unconstitutional. (Appendix "A")

Appellant petitioned the California Supreme Court for a writ of review. On October 28, 1987, the California Supreme Court denied the petition, thereby upholding the disciplinary rules challenged by Appellant as violative of the First Amendment. (Appendix "C")

THE QUESTION IS SUBSTANTIAL

The question of whether a presumption that "testimonial" advertising is false, misleanding or deceptive, constitutes an invalid restraint upon protected commercial speech is substantial since courts have held that one seeking to uphold a restriction on commercial

speech should bear the burden of proving that such speech is unprotected. (e.g. *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60, 71).

Moreover, the question is substantial because the rule prevents lawyers from presenting *truthful* "testimonial" advertising, and this, as applied, constitutes a "blanket ban" on such advertising. *Zauderer v. Office of Disciplinary Counsel* 471 U.S. 626 (1985). Why should a consumer be prevented from listening to a former client of Appellant stating *facts* which are unquestionably true and how can Appellant be disciplined for having his former client present such *facts*

Lawyers, of course, are entitled to First Amendment Protection as are other citizens, even when it comes to commercial speech "which serves individual and societal interests in assuring informed and reliable decisionmaking. *Bates v. State Bar of Arizona* 433 U.S. 350, 364 (1977). Because the California rule proscribes advertising which undeniably informs the public, whether the proscription is constitutional is a substantial question.

1. RULE 2-101 AND THE STANDARD ADOPTED PURSUANT TO SUCH RULE IMPERMISSIBLY SHIFT THE BURDEN OF PROOF TO THE ACCUSED ATTORNEY TO SHOW THAT HIS "TESTIMONIAL" ADVERTISING IS NOT FALSE, MISLEADING OR DECEPTIVE.

Rule 2-101(D) of the Rules of Professional Conduct of the State Bar of California and the Standard promulgated thereunder, provide that testimonial advertising is false, deceptive or misleading to the public (even if

this advertising is entirely truthful). Since this Court and other courts have held that the burden of proof must be on the person seeking to uphold a restriction on commercial speech, and since lawyer advertising is undoubtedly commercial speech, and since at least one other State has held that in the context of lawyer advertising, the one seeking to impose discipline must bear the burden of proof, the question as to the validity of the California Rule and Standard promulgated thereunder when challenged on First Amendment grounds is substantial.

This Court and other courts have held that the party seeking to uphold a restriction on commercial speech carries the burden of justifying the restriction. Thus, the California State Bar Rule and the Standard adopted thereunder cannot stand in the face of a constitutional challenge. *Bolger v. Youngs Drug Products Corp.* 463, U.S. 70, 71 fn. 20 (1983). See also, *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York* 447 U.S. 557, 570 (1980); *Linmark Associates, Inc. v. Township of Willingboro* 431 U.S. 85, 93 (1977); *Primary Care Physicians Group P.C. v. Ledbetter* 634 F.Supp. 78, 82 (N.D. Ga 1986).

In the context of lawyer advertising, the Supreme Court of Wisconsin has interpreted this Court's holding in *In re R.M.J.* 455 U.S. 191 (1982), as requiring the burden of proof in a lawyer discipline case to be borne by the party seeking to impose that discipline. In *In the Matter of Disciplinary Proceedings Against Jack L. Marcus,* 107 Wis.2d 560, 320 N.W.2d 806 (1982), the Board of Attorneys Professional Responsibility appealed from an order of a referee dismissing complaints of professional misconduct filed against attorneys based on certain newspaper advertisements. The

Wisconsin Supreme Court affirmed the referee's order and stated:

> "In light of *R.M.J.*, we interpret [the disciplinary rule] and its predecessor as requiring the party which is seeking to have discipline imposed to bear the burden of proving by clear and satisfactory evidence that the advertisement violates the rule." (id.)

The conflict between the California rule which shifts the burden of proof to an accused attorney to show that his "testimonial" advertising is protected speech, and this and other court's decisions in, e.g., *Bolger,* supra, *R.M.J.,* supra, and *Matter of Marcus,* supra, make clear that the California rule cannot withstand constitutional scrutiny.

The reason why the burden of proof must, of necessity, be placed upon the party seeking to have speech curtailed was discussed in *Speiser v. Randall* 357 U.S. 513 (1958), wherein this Court was called upon to decide the validity of a California statute requiring a loyalty oath as a condition for obtaining a tax exemption which placed the burden upon the taxpayer to prove that he did not engage in criminal speech. In holding the "presumption" invalid under the speech and due process provisions of the Constitution, this Court said:

> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding–inherent in all litigation–will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far

wider of the unlawful zone than if the State must bear these burdens. . . . How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. 'It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' [citation omitted]." 357 U.S. at 562.

The California rule which is challenged here creates a presumption that "testimonials" are false, deceptive or misleading. As in *Speiser,* supra, the burden of proof is upon the individual to show that his speech is constitutionally protected, that is, not "misleading." But, as in *Speiser,* the State clearly has no substantial interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech.

Although the California rule which is challenged concerns commercial speech, the rationale of *Speiser* is still persuasive. As stated in *In re R.M.J.* 455 U.S. 191, 207:

> "But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements."

Similarly, imposing discipline upon the instant Appellant in the absence of a finding that his speech was misleading transgresses the requirements of the First and Fourteenth Amendments.

This court faced an issue nearly identical to the instant issue in *Zauderer v. Office of Disciplinary Counsel* 471 U.S. 626 (1985). There, as here, the Office of Disciplinary Counsel *stipulated that the advertisement's information and advice concerning the Dalkon Shield was neither false nor deceptive. In fact, it was completely accurate.* 105 S.Ct. at 2276. This Court held that a prophylactic restraint upon lawyer advertising was unconstitutional, stating:

> "Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. . . . Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising." [emphasis added]. 105 S.Ct. at 2279-2280.

Similarly, the necessity for free flow of information regarding legal services is valuable enough to justify imposing on the would-be regulators the burden of proof.

2. AS APPLIED, RULE 2-101(D) AND THE STANDARD ADOPTED PURSUANT TO SUCH RULE CONSTITUTE A "BLANKET BAN" ON "TESTIMONIAL" ADVERTISING.

Appellant was disciplined although, (a) there was a specific finding at an informal hearing before Referee

Craig that the advertisement for which Appellant was disciplined was not in fact misleading; (b) the stipulation entered into between the Respondent and the State Bar states that the testimonial was true; and (c) there has never been a specific finding that the advertising was misleading. Thus, the net effect of the California Rule, and Standard promulgated thereunder, is that the legitimate, factual and truthful utterance is penalized. Since an attorney cannot possibly sustain the burden of proving the negative of these complex factual elements (i.e., not misleading) *Speiser,* supra, the application of the California Rule and the Standard promulgated thereunder result in a "blanket ban" on testimonial advertising.

In light of this Court's holdings in *Bates v. State Bar of Arizona* 433 U.S. 350 (1977), and *R.M.J.*, supra, a blanket ban on lawyer advertising is forbidden by the provisions of the First and Fourteenth Amendments of the United States Constitution. More specifically, in *Zauderer,* supra, this Court held that a disciplinary rule restricting illustrations in advertising was invalid, stating:

> "Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, the appellant may not be disciplined for his use of an accurate and nondeceptive illustration." 105 S.Ct. 2279-2280.

Similarly here, given the possibility of policing the use of testimonials on a case-by-case basis, the prophylactic approach (the presumption) taken by the State Bar of California cannot stand, and Appellant should not be disciplined for his use of an accurate testimonial.

At least one State Supreme Court has questioned the validity of a ban on "testimonial" advertising in light of this Court's holding in *Zauderer,* supra. See, e.g., *Jones v. Louisiana State Board of Dentistry* 483 So.2d 140 (La. Supreme Court 1986). Since the application of the California rule and standard promulgated thereunder result in a ban on testimonial advertising, the question of their validity is substantial.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

SCOTT SPOLIN
THEODORE A. COHEN
Counsel for Appellant
MARK ORING

APPENDIX "A"

STATE BAR COURT
THE STATE BAR OF CALIFORNIA
REVIEW DEPARTMENT
(Filed June 2, 1987)

PUBLIC MATTER

84-0-131 LA–In the Matter of Mark H. Oring

I, Lori King, hereby certify that I am Chief Deputy Clerk of the State Bar Court, and that as such, I am the custodian of records of all files of the State Bar Court, and that the following is a full, true and correct copy of a resolution or resolutions proposed at the meeting of the Review Department held in Los Angeles, California on April 2-3, 1987, and adopted as the decision of the Review Department on May 14, 1987 insofar as it relates to the above-entitled proceeding:

After discussion anad consideration by the Review Department of the record in the above-entitled proceeding and upon motioin made, seconded and adopted it was

RESOLVED that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted.

Referees Boyle, Hinderfeld, Katsky and Mitchell voted no on the adoption of the preceding motion and requested that the record so show. Referees Boyle, Katsky and Mitchell so voting on the ground that this body should have re-examined the issue(s) presented in *Grey v. State Bar,* Supreme Court No. LA 32152,

because in their view the presumption in Rule 2-101, Rules of Professional Conduct, is unconstitutioinal *Jacoby v. State Bar* (1977) 19 Cal.3d 359. The stipulation of Oring does not allow discipline when the first amendment of the U.S. Constitution precludes it.

Referee Hinerfeld stated as follows his reasons for voting no on the adoption of the foregoing resolution: If there is any validity to the Constitutional analyses in *Jacoby v. State Bar* (1977) 19 Cal.3d 359 and in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, the kind of information that the public is likely to want incident to selecting a lawyer is truthful testimonial evidence from satisfied clients and fee and cost data. See, e.g., the first two sentences in Justice Mosk's opinion for the Supreme Court in *Jacoby, supra* 19 Cal.3d at 362. See also *Jacoby,* supra, 19 Cal.3d at 368: ("The First Amendment protects the freedom of expression of all citizens, including lawyers. Petitioners have a right not only to respond to questions from the media on important issues, but also a right to seek out the media to express their views. Insofar as the present proceedings effectively inhibit petitioners from speaking their mind on an important issue–the delivery of inexpensive legal services to middle income persons–they infringe on important First Amendment rights.") (Headnotes and Footnotes omitted).

But consise fee information is generally misleading unless the law firm charges one price for every legal service which the public might request. The presumption against client testimonials will prevent the public from having the most reliable, concise indicator of the quality of a law firm's product.

If lawyers are effectively prohibited from giving concise, useful data on their fees and on the quality of their work, advertising will be reduced to mindless repetition of law firm names, addresses, and telephone numbers, which is what the lawyers were allowed to do in an alphabetical entry in the Yellow Pages before *Jacoby* and *Bates*. That information does not distinguish one law frim from another. It is basically useless.

The rebuttable presumption against testimonials in lawyer advertising is invalid under the first amendment and the free speech provision in the California Constitution. It is irrational and unreasonably frustrates the publics right to know and the attorney's right of free speech which are guaranteed by both constitutional provisions.

/s/ Lori King, Chief Deputy Clerk
of the State Bar Court

Dated: June 2, 1987

DECLARATION OF SERVICE

I, the undersigned, over the age of 18 years, whose business address and place of employment is 818 West Seventh Street, Los Angeles, California, declare that I am not a party to the within action; that in the City and County of Los Angeles, on the date shown below, I deposited a true copy of the within

MINUTES OF REVIEW DEPARTMENT MEETING
HELD ON APRIL 2 AND 3, 1987

in a sealed envelope as follows:

In a facility regularly maintained by the United States Postal Service with postage thereon fully prepaid addressed to:

Mark Howard Oring, Esq.
9401 Wilshire Boulevard
Suite 650
Beverly Hills, CA 90212

Theodore A. Cohen, Esq.
433 N. Camden Drive
Suite 900
Beverly Hills, CA 90210

In an inter-office mail facility regularly maintained by the State Bar of California addressed to:

Erica Tabachnick, Attorney At Law

Dated: July 7, 1987

I declare under penalty of perjury at Los Angeles, California, on the date shown above, that the foregoing is true and correct.

/s/ Deborah Harrison
Deputy Court Clerk
Effectuation Unit
Office of the State Bar Court

APPENDIX "B"

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DAVID GREY

STATE BAR COURT
THE STATE BAR OF CALIFORNIA
DISTRICT 7

In the Matter of	84-0-131 LA (LA 3841)
DAVID A. GREY, MARK ORING	FINDINGS OF FACT AND RECOMMENDATION
Members of the State Bar	(Filed May 28, 1985)

DECISION

The above matter having been set for hearing, pursuant to the Rules of Procedure of the State Bar of California, including a statement of the matters to be subject of the hearing and written notice of the hearing having been given, the above-entitled matter came on regularly for hearing on December 5, 1984 at the office of the State Bar of California in Los Angeles.

Respondent, DAVID ASHBURN GREY, was represented by Steven J. Ruben, Esq. and Lori A. Toyama, Esq. of Breidenbach, Swainston, Yokaitis & Crispo. Theodore A. Cohen, Esq. reresented respondent MARK ORING. The examiners for the State Bar were Erica Tabachnik, Esq. and R. Gerald Markle, Esq.

The Hearing Panel consisted of Loyd Reed, Esq., James Kellner, Esq., and Barry J. Post, Esq. The Stipulation of Facts which was entered into by the State Bar and

respondents, was approved by the Hearing Panel and the parties were given an opportunity to present argument. The hearing was reported by Kathy Hall, C.S.R.

DECISION BY THE HEARING PANEL

This Hearing Panel unanimously finds no culpability on respondents, David A. Grey and Mark Oring, because Rule 2-101 is unconstitutional for the following two reasons: (1) the rule shifts the burden of proof that the attoney has been guilty of unprofessional conduct from the State Bar to the respondents requiring respondents to disprove culpability; and (2) there is no standard setting forth the requirements of what an attorney must meet in order to rebut the presumption of violation of Rule 2-101. This Hearing Panel need not and does not make a determination of whether the advertisement here involved is or is not misleading.

IT IS SO ORDERED.

DATED: May 17, 1985

/s/ LOYD W. REED

DATED: May 15, 1985

/s/ JAMES KELLNER

DATED: May 14, 1985

/s/ BARRY J. POST

APPENDIX "C"

S002271

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

MARK H. ORING

v.

THE STATE BAR OF CALIFORNIA

(Filed Oct. 28, 1987)

The petition for writ of review is DENIED

/s/ Lucas
Chief Justice

APPENDIX "D"

STATE BAR COURT
THE STATE BAR OF CALIFORNIA
DISTRICT 7

In the Matter of DAVID A. GREY, MARK ORING Members of the State Bar	84-0-131 LA (LA 3841) STIPULATION AS TO FACTS AND DISPOSITION Pursuant to Rule 407 of the Rules of Procedure of the State Bar

It is stipulated by and between the State Bar through its Examiners, R. GERALD MARKLE and ERICA TABACHNICK, and Respondent, MARK ORING, and his counsel, THEODORE A. COHEN, in accordance with Rule 407 of the Rules of Procedure of the State Bar as follows:

A. *THE FORMAL PROCEEDING INVOLVED*

This formal proceeding was commenced on or about April 24, 1984, by issuance of a Notice to Show Cause against David A. Grey and Mark Oring (hereinafter "Respondents"). On May 14, 1984, said Notice to Show Cause waas personally served on Respondents.

It is now the intention of the State Bar and Respondent, Mark Oring, to dispose of all charges in this proceeding pursuant to the terms of this stipulation, in accordance with Rule 407 of the Rules of Procedure of the State Bar.

B. *STATEMENT OF STIPULATED FACTS*

1. Respondent, David A. Grey, was admitted to the practice of law in the State of California on December 18, 1975. Respondent, Mark Oring, was admitted to the practice of law in the State of California on June 28, 1977.

2. In or about 1981, Respondents engaged in a radio advertising program concerning Respondents' availability for professional employment.

3. One such radio "spot" consisted of a former client of Respondents, Sharon S., giving the following message:

> "I was rear ended on the San Diego Freeway and my medical bills were piling up and the insurance company was giving me a hard time, constantly harrassed me, just all in all gave me a bad time. I contracted an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey & Ohring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I'd definitely go back to Grey and Oring. I certainly do believe that."

Said message was followed by an announcer adding:

> "Grey & Oring. That's G-R-E-Y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey & Oring, 558-8000. There's no charge for consultation. 558-8000."

4. The statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded.

5. At the time they engaged in said radio advertising program, Respondents were aware of Rule 2-101 and,

in particular, of presumption (2), adopted pursuant to Rule 2-101(D) of the Rules of Professional Conduct, which states as follows:

> "(2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct."

C. *STATEMENT OF MITIGATING CIRCUMSTANCES*

Respondent, Mark Oring, is 44 years old and was admitted to the State Bar of California on June 28, 1977. Prior to the instant proceeding, no formal disciplinary proceedings have been commenced against Respondent, Mark Oring. Respondent represents that he is not presently running any advertisements and has no intention of doing so in the future.

D. *RECOMMENDED STIPULATED DISPOSITION*

It is recommended that Respondent, Mark Oring, be admonished for running radio advertisements that included testimonials and/or endorsements concerning his availability for professional employment in violation of Rule 2-101 of the Rules of Conduct of the State Bar of California.

It is acknowledged and understood by the parties hereto that the within Stipulation As To Facts and Disposition is subject to review by the Review Department of State Bar Courts and the California Supreme Court. It is further acknowledged and understood by the parties that the within stipulation as to recommended disposition is not binding upon the California Supreme Court.

THE STATE BAR OF CALIFORNIA

DATED: 12/5/84
By: /s/ R. GERALD MARKLE
Examiner

DATED: 12/5/84
/s/ ERICA TABACHNICK
Examiner

DATED: 12/5/84
/s/ THEODORE A. COHEN, ESQ.
Attorney for Respondent Oring

DATED: 12/5/84
/s/ MARK ORING
Respondent

REVIEWED & APPROVED

DATED: 12/5/84
/s/ R. GERALD MARKLE
Assistant Chief Trial Counsel

APPENDIX "E"

THEODORE A. COHEN
Attorney at Law
433 N. Camden Drive #900
Beverly Hills, CA 90210
(213) 271-7164

Attorney for Respondent Mark Oring

STATE BAR COURT
THE STATE BAR OF CALIFORNIA
DISTRICT 7

In the Matter of:	No. 84-0-131 LA (LA 3841)
DAVID A. GREY, MARK ORING	STIPULATION RE: FILING AND FORCE OR EFFECT OF "STIPULATION AS TO FACTS AND DISPOSITION ETC."
Members of the State Bar	

It is hereby stipulated by and between the State Bar through its Examiners, GERALD R. MARKLE and ERICA TABACHNICK, and Respondent, MARK ORING, and his Counsel, THEODORE A. COHEN, as follows:

Reference is hereby made to that certain "Stipulation as to Facts and Disposition Pursuant to Rule 407 of the Rules of Procedure of the State Bar" an executed copy of which is attached hereto as Exhibit "A".

That the said Stipulation, (Exhibit "A") shall be of no force or effect unless and until a final disciplinary Order is made and entered as against Respondent DAVID A. GREY. Any Order so made as to DAVID A. GREY shall not be deemed "final" unless and until all appeals, petitions for hearing, petitions for certiorari, etc. have been exhausted at all State and Federal levels should GREY seek such relief.

In the event that GREY should be exonerated or the Notice to Show Cause herein dismissed, or in the event that GREY is otherwise discharged without the imposition of any discipline, the Stipulation (Exhibit "A") shall be of no force or effect, except that an admonition imposed upon or issued to GREY shall not invalidate such Stipulation (Exhibit "A"), it being the intention of the parties and counsel herein that ORING shall not be subject to any greater degree of discipline at any time as the degree of discipline ultimately imposed upon GREY.

THE STATE BAR OF CALIFORNIA

DATED: 12/5/84
By: /s/ R. GERALD MARKLE
Examiner

DATED: 12/5/84
/s/ ERICA TABACHNICK
Examiner

DATED: 12/5/84
/s/ THEODORE A. COHEN
Attorney for Respondent Oring

DATED: 12/5/84
/s/ MARK ORING
Respondent

REVIEWED & APPROVED

DATED: 12/5/84
/s/ R. GERALD MARKLE
Assistant Chief Trial Counsel

APPENDIX "F"

PUBLIC MATTER

STATE BAR COURT
THE STATE BAR OF CALIFORNIA

In the Matter of	)	
	)	84-0-131 LA
DAVID A. GREY & MARK H. ORING	)	
	)	(Filed Oct. 28, 1985)
A Member of the State Bar	)	

I, Judy Duffield, hereby certify that I am Clerk of the State Bar Court, and that as such, I am the custodian of records of all files of the State Bar Court, and that the following is a full, true and correct copy of the minutes of the meeting of the Review Department held in Los Angeles, California on August 28-29, 1985, insofar as they relate to the above-entitled proceeding.

The following persons appeared before the Review Department in the above-entitled matter: Steven J. Rubin and Lori A. Toyama, co-counsel for Respondent Grey, Erica Tobachnik and R. Gerald Markle, co-examiners for the State Bar. Mavis Theodoro, C.S.R., Court Reporter, was also present.

Referee Craig stated that he was disqualified from participating in this matter and did not paricipate in the considertion or decision of this proceeding.

There being no appearance by or on behalf of Respondent Mark H. Oring, Lori King, Chief Deputy Clerk, Office of the State Bar Court, stated that if there were no objection, the Office of the Clerk of the State Bar Court will make

part of the record copies of the notices of Review Department hearing sent to Respondent Mark H. Oring. No objections were stated thereto.

In response to a question from Referee Hinerfeld as to whether the parties had any objection to Referee Hinerfeld participating in this matter although Mr. Ruben had represented Mr. Hinerfeld's firm about ten years ago in an unrelated matter, the parties stated that each had no objection to Mr. Hinerfeld participating in this matter.

Ms. Tobachnik and Mr. Rubin each addressed the Review Department and each answered questions put to them by members of the Review Department.

Mr. Markle also answered questions put to him by members of the Review Department.

Respondent David A. Grey entered the room during the argument of counsel above.

The matter was taken under submission by the Review Department.

* * *

This matter previously having been submitted, after discussion and consideration of the matter by the Review Department and upon motion made, seconded and adopted, it was

RESOLVED that the Review Department hereby adopts findings of fact as to Respondent David A. Grey:

FINDINGS OF FACT

1. Respondent, David A. Grey, was admitted to the

practice of law in the State of California on December 18, 1975.

2. In or about 1981, Respondent engaged in a radio advertising program concerning Respondent's availability for professional employment.

3. One such radio "spot" consisted of a former client of Respondent, Sharon S., giving the following message:

> "I was rear ended on the San Diego Freeway and my medical bills were piling up and the insurance company was giving me a hard time, constantly harrassed me, just all in all gave me a bad time. I contracted [sic] an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey & Oring. They immediately took the case and we finally ended up in Court. I got a nice award of money and all of a sudden I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I'd definitely go back to Grey and Oring. I certainly do believe that."

Said message was followed by an announcer adding:

> "Grey & Oring. That's G-R-E-Y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey & Oring, 558-8000. There's no charge for consultation. 558-8000."

4. The statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or

Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded.

5. The above statements of Sharon S. constituted an endorsement of Respondent.

6. At the time the Resondent engaged in said radio advertising program, Respondent was aware the provisions of Rule 2-101, Rules of Professional Conduct, and, in particular was aware of standard (2), adopted by the Board of Governors of the State Bar pursuant to Rule 2-101(D) of the Rules of Professional Conduct. Standard (2) states as follows:

> "(2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct."

7. The above quoted presumption adopted pursunt to Rule 2-101(D), Rules of Procedure of the State Bar, is constitutional as applied to Respondent David A. Grey. Respondent failed to present evidence sufficient to rebut said presumption".

FURTHER *RESOLVED* that the Respondent, David A. Grey is hereby publicly reproved.

Voting Yes:	Referees Dell'Ario, Lynch, Parkin, Vogt and Anderson.
Voting No:	Referees Ching, Hinerfeld, Mackey, Reading.
Not Voting:	Referees Craig, Kilpatrick, Orr.

Referee Hinerfeld stated as follows his reasons for voting no on the adoption of the foregoing resolution: If there is any validity to the Constitutional analyses in *Jacoby v. State Bar* (1977) 19 Cal.3d 359 and in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, the kind of information that the

public is likely to want incident to selecting a lawyer is truthful testimonial evidence from satisfied clients and fee and cost data. See, e.g., the first two sentences in Jusice Mosk's opinion for the Supreme Court in *Jacoby. supra,* 19 Cal.3d at 362. See also *Jacoby, supra,* 19 Cal.3d at 368: ("Petitioners have a right not only to respond to questions from the media on important issues, but also a right to seek out the media to express their views. Insofar as the present proceedings effectively inhibit petitioners from speaking their mind on an important issue–the delivery of inexpensive legal services to middle income persons–they infringe on important First Amendment rights").

But concise fee information is generally misleading unless the law firm charges one price for every legal service which the public might request. The presumption against client testimonials will prevent the public from having the most reliable, concise indicator of the quality of a law firm's product.

> If lawyers are effectively prohibited from giving concise, useful data on their fees and on the quality of their work, advertising will be reduced to mindless repetition of law firm names, addresses, and telephone numbers, which is what the lawyers were allowed to do in an alphabetical entry in the Yellow Pages before *Jacoby* and *Bates.* That information does not distinguish one law firm from another. It is basically useless.

The rebuttable presumption against testimonials in lawyer advertising is invalid under the first amendment and the free speech provision in the California Constitution. It is irrational and unreasonably frustrates the public's right to know which is guaranteed by both constitutional provisions.

> *Referee Ching* stated the following reasons for voting no on the adoption of the foregoing resolution: 1) The record contains insufficient evidence

> to sustain the findings of culpability; and 2) Presumption #2 is in conflict with other sections of Rule 2-101 Rules of Professional Conduct and therefore exceeds authority granted in Rule 2-101(D). As such, it amounts to conclusive presumption.

Dated: October 23, 1985

/s/ Judy Duffield, Clerk
of the State Bar Court

DECLARATION OF SERVICE

I, the undersigned, over the age of 18 years, whose business address and place of employment is 1230 West Third Street, Los Angeles, California, declare that I am not a party to the within action; that in the City and County of Los Angeles, on the date shown below, I deposited a true copy of the within

MINUTES OF REVIEW DEPARTMENT MEETING HELD ON AUGUST 28 AND 29, 1985 in a sealed envelope as follows:

In a facility regularly maintained by the United States Postal Service with postage thereon fully prepaid addressed to:

David Ashburn Grey, Esq.
1800 North Vine
2nd Floor
Los Angeles, CA 90028

Steven J. Ruben, Esq.
Lori A. Toyama, Attorney at Law
611 West Sixth Street
Suite 1300
P.O. Box 57936
Los Angeles, CA 90017

In an inter-office mail facility regularly maintained by the State Bar of California addressed to:

Erica Tabachnick, Attorney of Law
R. Gerald Markle, Esq.

Dated: December 17, 1985

I declare under penalty of perjury at Los Angeles, California, on the date shown above, that the foregoing is true and correct.

/s/ Deborah Harrison
Office of the State Bar Court

APPENDIX "G"

SCOTT SPOLIN
THEODORE A. COHEN
Attorneys at Law
433 North Camden Drive
Suite 900
Beverly Hills, CA 90210

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARK H. ORING, Appellant, vs. THE STATE BAR OF CALIFORNIA, Appellee.	Case No: Cal. Supreme Ct. S002271 NOTICE OF APPEAL (Filed Jan. 7, 1988)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

NOTICE IS HERBY GIVEN that Mark H. Oring, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, denying review and thereby imposing discipline upon the Appellant as recommended by the Review Department of the State Bar Court, State Bar of California, entered herein on October 28, 1987.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

DATED: January 6, 1987

/s/ SCOTT J. SPOLIN
Counsel of Record for Appellant

I, the undersigned, say: I am a party, or an authorized representative of a party, to the within action; I have read the foregoing pleadings and/or documents to which this verification is attached and know the contents thereof; and that the same is true of my own knowledge, except as the matters which are therein stated upon my information or belief, and to those matters that I believe it to be true.

I certify the foregoing to be true under penalty of perjury.

Executed in California at the City of (place)
on (date)

(signature)

*PROOF OF SERVICE BY MAIL . . .*CCP 1013a, 2015.5

I, the undersigned, say: I am employed at the business address of 433 N. Camden Drive, Beverly Hills, California; I am over the age of 18 years and am not a party to the within action; on the date stated below I served the pleadings and/or documents affixed hereto by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail adjacent to my above stated business address, addressed as follows:

STATE BAR OF CALIFORNIA
555 Franklin Street
San Francisco, CA 94102

(Three Copies)

I certify the foregoing to be true under penalty of perjury. Executed at Beverly Hills, California on January 6, 1987.

/s/ MARTIN LOUIS STANLEY

Supreme Court, U.S.
FILED
FEB 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING
Appellant,

vs.

THE STATE BAR OF CALIFORNIA
Appellee.

On Appeal from the Supreme Court
of California

MOTION TO DISMISS OR AFFIRM

DIANE C. YU
TRUITT A. RICHEY, JR.*
GERALD R. MARKLE
ERICA TABACHNICK
Attorneys at Law
555 Franklin Street
San Francisco, California 94102
(415) 561-8200
Attorneys for Appellee

*Counsel of Record

QUESTIONS PRESENTED

1. Whether appellant who stipulated in proceedings below to accept such discipline as might be finally imposed against David Ashburn Grey, his law partner, for the broadcasting by the law partnership of an advertisement seeking professional employment, may now, after a public reproval was imposed on David Ashburn Grey and certiorari was denied by this Court (Grey v. The State Bar of California, U.S. S.Ct. No. 86-791), seek this Court's review of such stipulated discipline.

2. If appellant is not by his stipulation precluded from seeking review in this Court, may a lawyer be subjected to professional discipline (a public reproval) for broadcasting an advertisement soliciting professional employment which is inherently misleading in that a client gave a testimonial about and

endorsement of the lawyer by telling of a substantial recovery the attorney obtained for the client (who was involved in a traffic accident on a freeway) but omitting relevant facts which would have disclosed that a great portion of that recovery was based on an unusual cause of action and special facts (a bad faith claim against an insurance company) not available to most claimants?

3. May discipline be imposed pursuant to a Rule of Professional Conduct that forbids lawyer advertising that tends to confuse and mislead the public and requires the inclusion in such advertising of statements that are intended to reduce or eliminate the likelihood that recipients of the advertising will be misled?

4. May discipline be imposed for an advertisement that on its fact is inherently confusing and misleading to the

public but which with a few additional words of explanation and caveat could have been corrected so that it did not confuse or mislead?

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No. 87-1224

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARK H. ORING

Appellant,

v.

THE STATE BAR OF CALIFORNIA

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee, The State Bar of California, respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Supreme Court in Mark H. Oring v. The State Bar of California (Cal. S.Ct. Docket No. S002271)* On October 28, 1987, the

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* The State Bar Court is not a court of record. It acts as a quasi-judicial arm of

(Footnote continued on next page.)

California Supreme Court denied appellant's Petition for Writ of Review of an order of the State Bar Court imposing a public reproval on appellant.

I

THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

The Rules of Professional Conduct of The State Bar of California are adopted by the Board of Governors of The State Bar of

---

(Footnote continued from preceding page.)

The Supreme Court of California, and is established by the State Bar, pursuant to statute, to hear lawyer discipline matters and make recommendations as to suspension or disbarment to the California Supreme Court. Cal. Bus. & Prof. Code, §§ 6077, 6078, 6081 and 6086.5. The State Bar Court may impose public or private reprovals on members of the State Bar without recommendation to the Supreme Court (Bus. & Prof. Code, §§ 6077, 6078), but the members may seek review of that action in the California Supreme Court which may or may not grant review. Once review is sought, whether or not it is granted, the final disciplinary decision becomes that of the Supreme Court of California. See Konigsberg v. The State Bar of California, 353 U.S. 252, 254, 77 S.Ct. 722, 724 (1957).

California. When approved by the Supreme Court of California they are binding upon all members of The State Bar of California and for their violation the State Bar may administer a public or private reproval to the member or recommend to the Supreme Court that he or she be suspended from the practice of law for a period not exceeding three years. Cal. Bus. & Prof. Code, §§ 6077, 6078.

At issue in this proceeding is rule 2-101 of the Rules of Professional Conduct. Rule 2-101 was approved by the Supreme Court of California effective April 1, 1979 subsequent to and partially in response to this Court's decision in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2671 (1977).*

---

* The study leading to the revision of the California Lawyer Advertising Rules began and continued for some years before the Bates decision.

Rule 2-101, as relevant here, reads as follows:

'RULE 2-101. PROFESSIONAL EMPLOYMENT.

"This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

"Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

"(A) A 'communication' is a message concerning the availability for professional employment of a member or a member's firm. A 'communication' made by or on behalf of a member shall not:

"(1) Contain any untrue statements; or

"(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

"(3) Omit to state any fact necessary to make the statements made, in the light of

the circumstances under which they are made, not misleading to the public; or

"(4) Fail to indicate clearly, expressly or by context, that it is a 'communication'; or

"(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

"(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

* * *

"(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what 'communications' will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. 'Presumption affecting the burden of proof' means that presumption defined in Evidence

Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar."

Pursuant to rule 2-101(D), the Board of Governors of the State Bar has adopted the following standards effective May 25, 1979:

"(1) A 'communication' which contains guarantees, warranties or predictions regarding the result of legal action is presumed to violate rule 2-101, Rules of Professional Conduct.

"(2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct.

"(3) A 'communication' which is delivered in person or by telephone to a potential client who is in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel, is presumed to violate rule 2-101, Rules of Professional Conduct.

"(4) A 'communication' which is transmitted at the scene of an accident or at or en route

to a hospital, emergency care center or other health care facility is presumed to violate rule 2-101, Rules of Professional Conduct."

II

STATEMENT OF THE FACTS

The essential facts were stipulated.

1. In or about 1982, appellant, along with his law partner, David Ashburn Grey,* engaged in a radio advertising program concerning his availabiity for professional employment.

2. On such radio "spot" consisted of a former client of appellant, Sharon S., giving the following message:

"I was rear ended on the San Diego Freeway and my medical bills were piling up and the insurance company was giving me a hard time, constantly harrassed me, just all in all gave me a bad

---

* This Court denied certiorari to David Ashburn Grey on January 12, 1987. The identical advertisement was involved, the identical constitutional issues were asserted. (Grey v. The State Bar of California, No. 86-791.)

time. I contracted [sic] an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey & Oring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I'd definitely go back to Grey & Oring. I certainly do believe that."

Said message was followed by an announcer adding:

"Grey & Oring. That's G-R-E-Y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey & Oring, 558-8000. There's no charge for consultation. 558-8000."

3. The statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their

office was present at the time the radio spot was recorded.

4. At the time he engaged in said radio advertising program, appellant was aware of rule 2-101 and, in particular, of presumption (2), adopted pursuant to rule 2-101(D) of the Rules of Professional Conduct, which states as follows: "(2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct."

A Hearing Panel* of the State Bar Court, after reviewing the stipulated

---

* In California the State Bar Court consists of numerous hearing panels which take evidence, make findings of fact and, if appropriate, recommendations of discipline. There is one Review Department which reviews Hearing Panel decisions and either adopts or (after giving the parties an opportunity to be heard) modifies the Hearing Panel decision. The ultimate

(Footnote continued on next page.)

facts and hearing argument concluded there was no culpability shown because rule 2-101(D) and Standard (2) were unconstitutional. The Review Department found the rule and standard constitutional and imposed a public reproval. Neither the Hearing Panel nor the Review Department made a finding as to whether the advertisement was or was not inherently misleading or in fact actually misled anyone.

During the course of the proceedings before the State Bar Court, appellant Oring and the State Bar Examiner entered into a Stipulation as to Facts and Disposition whereby certain factual statements were agreed upon and it was

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(Footnote continued from preceding page.)

decision or recommendation of the State Bar Court is made by the Review Department. Cal. Bus. & Prof. Code, § 6086; Rules of Procedure of The State Bar of California printed in Cal. Civ. & Crim. Court Rules, vol. 23, part 2, pp. 290-323 (West 1986).

agreed that appellant would be admonished. (Appellant's Appendix D (app. 10).) However, it was also agreed that the Oring stipulation would not be filed, nor of any force and effect, until such time as a "final disciplinary Order was made and entered as against [David Ashburn Grey]. Any Order so made as to DAVID A. GREY shall not be deemed 'final' unless and until all appeals, petitions for hearing, petitionrs for certiorari, etc. have been exhausted at all State and Federal levels should GREY seek such relief." (Appellant's Appendix E (app. 12).) The parties further stipulated that it was their intent that appellant "shall not be subject to any greater discipline at any time as [sic] the degree of discipline ultimately imposed on GREY." (Appellant's Appendix E (app. 13).) The parties agreed the stipulation as to discipline was subject to review by the Review Department

of the State Bar Court and the recommended discipline would not be binding on the California Supreme Court. (Appendix D (app. 10).) At the time of the filing of the Oring stipulation, counsel for appellant stated on the record:

> "Mr. Cohen: . . . In other words our intent is that whatever happens to Mr. Grey would happen to Mr. Oring." (Transcript of Dec. 5, 1984 proceedings, p. 3.)

Thereafter further proceedings were had involving Mr. Grey only. Appellant took no part in the Grey proceedings either before the State Bar Court or in Grey's efforts to persuade the California Supreme Court to grant review and the U.S. Supreme Court to grant certiorari. Grey did ultimately seek certiorari before this Court which was denied on January 12, 1987. (No. 86-791.) Thus the public reproval imposed on David Ashburn Grey for the same advertisement that is in issue in this proceeding was upheld and final.

The Grey disposition being final in April 1987, the Review Department of the State Bar Court proceeded pursuant to appellant's stipulation to impose the same discipline on him as had been upheld as to Grey. Appellant sought California Supreme Court review (which was denied on October 28, 1987) and appeal to this Court followed. This appeal raises the identical constitutional contentions that were previously before this Court when it denied certiorari in the Grey matter.

III

ARGUMENT

A. APPELLANT, BY HIS STIPULATION TO THE SAME DISCIPLINE THAT MIGHT ULTIMATELY BE IMPOSED ON DAVID ASHBURY GREY, HAS WAIVED ANY RIGHT TO URGE CONSTITUTIONAL CHALLENGES BEFORE THIS COURT

Before the State Bar Court, appellant stipulated to the same degree of discipline, if any, that might ultimately be imposed on David A. Grey. Grey

litigated the matter to this Court and certiorari was denied. (No. 86-791.) Holding appellant to his stipulation, the State Bar Court Review Department imposed a public reproval on appellant. This is the same discipline imposed on David Ashburn Grey, and it arises from the identical stipulated facts. The same constitutional contentions were made in Grey and certiorari was denied. Appellant now seeks to rehash these identical issues and, in addition, to avoid his stipulation. We submit that, for this reason alone, the appeal should be dismissed and the Supreme Court of California's order affirmed.

B. THE DECISION BELOW WAS DECIDED IN A WAY CONSISTENT WITH THE APPLICABLE DECISIONS OF THIS COURT AND PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN SETTLED BY THIS COURT

Rule 2-101(A) is on its fact constitutional. The restraints it places

on lawyer advertising are, we submit, as limited as those imposed by any rule now existing in the United States. In essence rule 2-101(A) prohibits lawyer advertising that contains untrue statements (rule 2-101(A)(1)); that uses a manner or format which is false or deceptive or which tends to confuse, deceive or mislead the public (rule 2-101(A)(2)); that omits to state any fact necessary to make the statements it contains not misleading to the public (rule 2-101(A)(3)); that fails to state it is a "communication" (i.e., an advertising message) (rule 2-101(A)(4)); that makes false statements regarding the member's status as a certified specialist (rule 2-101(A)(5)); or that is transmitted in a manner that is intrusive or coercive, etc. (rule 2-101(A)(6)).

There is no contention that appellant's radio advertisement violated subdivisions (4), (5) or (6). The parties

stipulated and the Review Department found that the statements made by Sharon S. in the advertisement were true and reflected her own actual experience.

However, the State Bar submits that in this case the advertisement in question on its face violated subdivision (2) and subdivision (3) of rule 2-101(A) and this is so, whether the rebuttable presumption of rule 2-101(D) is applied or not.

In the advertisement broadcast by appellant, Sharon S. stated:

> ". . . I got a nice award of money and all of a sudden, I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to triual and suddenly the insurance company offered me double the amount f the original trial. . . ."

Because this was the result of Sharon S.'s case, it does not simply follow that the advertised result would be available to the average consumer of legal services. Sharon S.'s case was unique and that

uniqueness was the set of underlying facts which gave rise to a bad faith cause of action against the defendant's insurance company. This factual pattern is seldom, if ever, present in most accident cases and the cause of action that Sharon S. had (and the resulting "double" recovery) are just not available to most prospective litigants. This was not explained--or even hinted at--in the broadcast advertisement. We submit it is clear from the face of the advertisement that it inherently tended to confuse and mislead the public that heard that broadcast (in violation of rule 2-101(A)(2)). Also, with the addition of a few words of appropriate disclaimer and factual explanation, the natural misconceptions inherent from the advertisement could have been avoided. Thus rule 2-101(A)(3) would not have been violated.

Under the law of this land, misleading advertisements may be restrained. See Virginia State Board of Pharmacy v. Virginia Consumers Council, 425 U.S. 748, 96 S.Ct. 1817 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2671 (1977); In re Primus, 436 U.S. 417, 98 S.Ct. 1893 (1978); In re RMJ, 455 U.S. 191, 102 S.Ct. 929 (1981); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265 (1985).

As to the validity of restricting misleading commercial speech, in fields other than the legal profession, see Central Hudson Gas v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343 (1980); Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887 (1979).

This Court has emphasized that attorneys who question the regulation of advertising are required to show that

their particular advertisements are constitutionally protected speech.

In answer to the contention that an overbroad regulation of lawyer advertising might serve to chill protected speech, the Court stated:

> "But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. at 771 n.24, 96 S.Ct. at 1830, there are 'common sense differences' between commercial speech and other varieties. See also id. at 775-781, 96 S.Ct. at 1832-1835 (Concurring Opinion). Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See id. at 771-772 n.24, 96 S.Ct. at 1830-1831. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. Ibid. Since overbreadth has been

> described by this court as 'strong medicine,' which 'has been employed . . . sparingly and only has a last resort,' (citation omitted) we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective." (Emp. added.) (433 U.S. at 380-381, 97 S.Ct. at 2707-2708.)

Thus, in the context of commercial speech, the overbreadth doctrine is unavailable to attorneys challenging the validity of regulations on such speech. Appellant must challenge the regulation as it applies to his conduct.

This is not a case where the meaning of the advertisement was clear and concise; the advertisement did confuse and mislead. Nor is it a case where the person responsible for the content of the advertisement (i.e., appellant, not his ad agency or Sharon S.) undertook by the use of simple explanations or caveats to make clear the actual meaning of Sharon S.'s statement and how unique her particular recovery

was. The constitutional arguments against a complete prohibition of lawyer testimonial advertising in these situations (whatver merit those arguments might have) are just not available here.

Further, neither rule 2-101(A) nor Standard (2) prohibit testimonial advertising by lawyers. A lawyer is free to advertise with testimonials if such advertisements are honest statements by the endorser and do not confuse or mislead the public. Further, a lawyer can place in a testimonial ad words of explanaton or caveat to reduce or eliminate the chances of confusing or misleading the public. In any disciplinary procedure, the lawyer is only required to show that the ad is not inherently misleading and that he has taken adequate steps to insure that.

The four Standards adopted by the California Board of Governors pursuant to rule 2-101(D) are specific and narrowly

drawn. The reason behind Standard (2) was explained in the Committee Report to the Board:

> "Testimonials are inherently deceptive and misleading because past performance of an attorney is no indication of future performance, and because no lawyer can guarantee the results of any legal action.
>
> "Advertising of acquittals or large verdicts may lead the public to believe that the likelihood of obtaining a similar result is high if the services of this particular attorney are obtained, and ignores the importance of facts, applicable law, and an attorney's selective choice of clients in determining the outcome of a case."

Lawyer advertisement is now a fact of life and has been since this Court's 1977 decision in Bates. California has recognized this and proceeded apace with the formulation and adoption of rules that would permit the widest range of lawyer advertising possible consistent with the legitimate state interest of public protection by preventing false

advertising, misleading advertising, confusing advertising and deceptive advertising. Rule 2-101 is that rule and Standard (2) adopted pursuant to that rule is recogition that, in lawyer advertising, testimonials and endorsements are likely to be inherently misleading. It puts on the advertiser (in this case, appellant) the burden of either insuring that his ads do not confuse or mislead or explaining why they do not. That is not an excessive burden for an advertiser to assume.

The State Bar Court Review Department concluded that Standard (2) as applied to appellant was constitutional. This conclusion was upheld by the Supreme Court of California. The ad in question was inherently confusing and misleading; the defects could have easily been remedied by providing more information in the ad. Appellant failed to do this and he provided no explanation.

IV

CONCLUSION

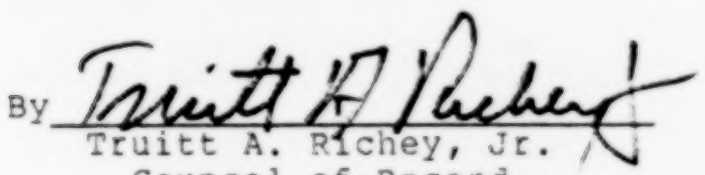
The decision below was decided in accord with constitutional principles established by this Court.

For the foregoing reasons, appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this case by the Supreme Court of California.

Dated: February 18, 1988

Respectfully submitted,

Diane C. Yu
Truitt A. Richey, Jr.
Gerald R. Markle
Erica Tabachnick

By 
Truitt A. Richey, Jr.
Counsel of Record

Attorneys for
The State Bar of California

DECLARATION OF SERVICE BY MAIL

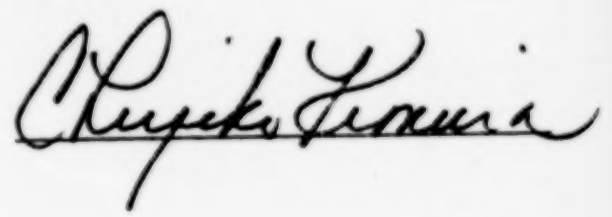
I, Chiyeko Kimura, declare as follows:
I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 Franklin Street, San Francisco, California 94102. On February 18, 1988, I served the within

MOTION TO DISMISS OR AFFIRM

on the interested parties by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Scott Spolin
Theodore A. Cohen
Wells Fargo Bank Building
433 North Camden Drive, Suite 900
Beverly Hills, CA 90210

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 18th day of February, 1988 at San Francisco, Califorinia.



(3)

Supreme Court, U.S.
FILED
AUG 22 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF CALIFORNIA IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

JOINT APPENDIX

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Jurisdictional Statement filed January 22, 1988
Probable Jurisdiction noted June 30, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

JOINT APPENDIX

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California Supreme Court's Denial of Petition for Writ of Review	See, Jurisdictional Statement, Appendix "C"
Stipulation as to Facts And Discipline	See, Jurisdictional Statement, Appendix "D"
Stipulation Re: Filing and Force or Effect of "Stipulation as to Facts and Disposition, etc."	See, Jurisdictional Statement, Appendix "E"
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APPENDIX A

1/11/83

LA 82-183

Decision of Local Administrative Committee

This matter was heard at a preliminary hearing held on 11/10/82. Resp's and Mr. Rochford, their counsel were present as was Ms. Pansky of the State Bar. The matter was taken under submission at that time.

The Committee has again reviewed the file and conducted its own research into the matter.

Although the Committee believes that the advertisement is a "testimonial" as that phrase is used in Rule 2-101(D), the Committee finds that there are not sufficient facts to warrant further proceedings. The creation of the presumption set forth in the foot note to Rule 2-101(D) does not meet the constitutional requirements as they have developed in this area. See *Speiser v. Randall,* 357 U.S. 513 (1958) and *Matter of R.M.J.* ___ U.S. ___ (1982) There was no evidence produced by the State Bar that suggested that the advertisement was in fact misleading.

State Bar to give notice of this decision.

/s/ JEROME H. CRAIG

APPENDIX B

STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
DISTRICT 7

IN THE MATTER OF DAVID A. GREY, MARK ORING, MEMBERS OF THE STATE BAR.	)))))))	No. 84-0-131 LA (LA 3841)

REPORTER'S TRANSCRIPT
December 5, 1984
Los Angeles, California

Hearing Panel:	LOYD REED, Principal Referee JAMES L. KELLNER, Referee BARRY J. POST, Referee
State Bar Examiners:	ERICA TABACHNICK R. GERALD MARKLE
Counsel for Respondent Grey:	STEVEN J. RUBEN AND LORI TOYAMA
Counsel for Respondent Oring:	THEODORD (sic) A. COHEN
Also Present:	RESPONDENT GREY

Reported by:
Katherine P. Hall, CSR 4487,
RPR and Notary Public

Hutchings No. LA 6298-84

EXHIBITS

DESCRIPTION	FOR IDENTIFICATION	IN EVIDENCE
Joint Exhibit 1	4	
Joint Exhibit 2	5	5

(p.2) LOS ANGELES, CALIFORNIA, WEDNESDAY, DECEMBER 5, 1985, 6:37 P.M.

REFEREE REED: This is the case in the matter of David Grey and Mark Oring.

Is the State Bar ready?

MS. TABACHNICK: Yes, we are.

REFEREE REED: Are the respondents ready?

MR. RUBEN: We are, for Grey.

REFEREE REED: As I understand, Mr. Cohen, on behalf of your client Mr. Oring, there's a little different procedure.

MR. COHEN: Slightly.

REFEREE REED: Could you tell us what that is?

MR. COHEN: We have worked out an arrangement with the State Bar and have entered into a stipulation as to facts and disposition pursuant to Rule 407 of the Rules of Procedure of the State Bar as to Respondent Oring.

I might state that Mr. Oring is not present. The State Bar is aware of the fact that he would not be here this evening and did not require his presence.

But going back to this stipulation, we have entered into a stipulation which has been signed by Counsel for State Bar, by myself, and by Respondent Mark Oring, the nature of which we would like to lodge, not file.

REFEREE REED: All right.

MR. COHEN: The reason being that that stipulation will not take effect unless and until there is a finding of culpability made and upheld through appeals and reviews as to (p.3) Respondent Grey, it being the intent of the parties, I suppose – Hold it.

(There is a conference between Mr. Cohen, Ms. Tabachnick and Mr. Markle out of the hearing of the reporter.)

MR. MARKLE: I think the understanding of the parties at this point is that the stipulation that Mr. Cohen is talking about we would lodge with the Hearing Panel this evening. In the event that the Hearing Panel makes a finding of culpability, then it's the position of the parties, in particular the State Bar, Mr. Cohen, and Mr. Oring, that the stipulation that we would lodge tonight would then become effective as the parties' stipulated recommended disposition of this case, which the Hearing Panel obviously can approve or disapprove.

In the event that this Hearing Panel finds that there is no culpability, then it's the parties' understanding that the stipulation would have no force and effect whatsoever, and that whatever decision that the Hearing Panel reaches, if that decision included a finding of no culpability, that decision would apply to both Mr. Oring and Mr. Grey.

MR. COHEN: I might add also that if, through appeals or reviews at some point, the matter is dismissed or the Respondent Grey otherwise discharged, that then that stipulation also would not apply.

In other words, our intent is that whatever happens to Mr. Grey would happen to Mr. Oring.

REFEREE REED: The thing that troubles me a little bit: Let's assume a scenario where we decide that Mr. Grey is in (p.4) deep trouble, and then the stipulation comes into effect, and then it goes up, and the Review Department disagrees with us and the Supreme Court says we are wrong. What then?

MR. COHEN: All of this subject – and I think it's in the stipulation – that we understand that this is merely a recommendation to this committee. It is merely a recommendation to the review board, and we have no control over what this review board or this panel or what the Supreme Court will do.

REFEREE REED: But if we assume a scenario that this Hearing Panel decides that Mr. Grey is culpable, then this document will be filed, period.

MR. COHEN: Yes.

REFEREE REED: Period, no matter what else happens.

MR. COHEN: Yes, our understanding being that it would not be enforced.

For example, supposing – which this doesn't apply, but supposing there were a situation where it was a stipulated suspension of 30 days. What we are saying is

that that would not go into effect with respect to Mr. Oring any sooner than it would go into effect as to Mr. Grey.

REFEREE REED: Fine. On that representaion, we will accept the stipulation.

MR. MARKLE: I suggest that we submit the stipulation as Joint Exhibit Number 1 for identification.

REFEREE POST: It's already been marked.

REFEREE REED: Exhibit Number 1, did you say?

MR. MARKLE: Yes.

(p.5) REFEREE KELLNER: Marked into evidence as Exhibit Number 1.

REFEREE REED: Not in evidence.

REFEREE KELLNER: Marked for identification by both the State Bar and respondents.

REFEREE POST: By Mr. Oring.

REFEREE REED: Not Grey.

MR. COHEN: In other words, we will leave Mr. Grey and his able Counsel to litigate.

REFEREE REED: You want to go, right?

MR. COHEN: If I may be excused.

REFEREE REED: You may be excused, in light of the stipulation.

Now, is the State Bar ready to proceed in respect to Mr. Grey?

MS. TABACHNICK: Yes, we are.

Before I start, I would like to have marked for identification and also offer into evidence at this time the Stipulation as to Facts Pursuant to Rule 401 of the Rules of Procedure, which can be marked Joint Exhibit Number 2.

REFEREE REED: Is there any objection to its being received into evidence?

MR. RUBEN: No.

REFEREE REED: Joint Exhibit Number 2 is received and admitted into evidence.

MS. TABACHNICK: Thank you.

I am going to try to be brief with my argument. I think it was fully briefed.

* * *

APPENDIX C

RULE 1-400. *ADVERTISING AND SOLICITATION.*

(A) *For purposes of this rule,* "communication" *means any* message *or offer made by or on behalf of a member* concerning the availability for professional employment of a member or a *law* firm *directed to any former, present, or prospective client, including but not limited to the following:*

(1) *Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or*

(2) *Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or*

(3) *Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or*

(4) *Any unsolicited correspondence from a member or law firm directed to any person or entity.*

(B) *For purposes of this rule, "solicitation" means any communication concerning the availability for* professional employment *of a member or a law firm in which a significant motive is* for pecuniary gain *and which is initiated by or on behalf of such member or law firm and which is delivered in person or by telephone or directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.*

(C) *A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.*

(D) *A communication or a solicitation (as defined herein) shall not:*

(1) *Contain any untrue statement; or*

(2) *Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or*

(3) *Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or*

(4) *Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or*

(5) *Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or*

(6) *State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court.*

(E) *The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.*

(F) *A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.*

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective ___ as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A "communicatioin", except professional announcements, seeking professional employment primarily for pecuniary gain which is transmitted by mail or equivalent means which does not clearly identify itself as an advertisement. If transmitted in an envelope, the envelope shall be identified as an advertisement on the outside thereof.

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation

which states or implies that a member has a relationship to any other member or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A "communication" which states or implies that a member or law firm is "of counsel" to another member or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

(10) A "communication" which implies that the member or member's firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

APPENDIX D

* * *

7. Proposed Rule 1-400. Advertising and Solicitation. (Current Rule 2-101)

Paragraph (A) is intended to define the specific types of "communications" to be regulated by the rule. In addition to a generic definition very similar to that found in current rule 2-101(A), proposed paragraph (A) contains four specific categories of communication sought to be regulated.

Paragraph (B) defines soliciation as a communication concerning professional employment for pecuniary gain, made in person or by telephone, which is initiated by or on behalf of the lawyer or law firm. Paragraph (C) prohibits such communications unless the lawyer has a family or prior professional relationship with the potential client.

Current rule 2-101(B) also prohibits in person or telephone contracts with potential clients, but has no exception for those prospective clients who have a family or prior professional relationship with the attorney. The exception to the ban or in person and telephone contacts is proposed because the potential for overreaching feared with in person or telephone contacts is perceived to be greatly reduced when a family member or former client is involved.

Several comments were received (including comments from the Federal Trade Commission and the Los Angeles County Bar Association) advocating elimination of the ban on in person and telephone solicitation altogether. These comments argued that

the prohibition precludes the public from getting vital consumer information by those means. The retention of the absolute prohibition (with the exception noted above) is recommended because:

a) The United States Supreme Court recognized in *Ohralik v. Ohio State Bar Association* (1977) 436 U.S. 447 and *In Re R.M.J.* (1982) 455 U.S. 191 that these methods are inherently capable of abuse and may be totally prohibited consistent with the First Amendment.

b) The recent rejection of the certiorari petition in *Grey v. State Bar of California* (LA Bar Misc. 32152) petition for review by California Supreme Court denied July 15, 1986, certiorari denied 107 S.Ct. 885 (Jan. 1, 1987) suggests that the United States Supreme Court is, at least presently, willing to permit states to adopt a fairly strong pro-regulation standard in weighing the competing interests of attorneys and the public;

c) The proposed rule would permit consumer information to be provided by all forms of general advertising, including directed mail and mass media; and

d) From a practical enforcement standpoint, if the disciplinary criteria is limited to rule 1-400(D) in regard to in person or telephone solicitation, the harm to the consumer will already have been done. A ban is a "brightline" test that lawyers and disciplinary bodies can easily understand

and apply, while requiring a case-by-case determination will almost certainly encourage unscrupulous attorneys to quibble or split hairs, engaging in conduct that will affect the public adversely and yet be largely immune from reasonable regulation.

The regulation of solicitation of clients by mail found in current rule 2-101(B) has not been included in proposed rule 1-400. Mailed communications would be regulated by proposed "Standard" (5), in addition to the regulations in paragraph (D) on the content of communications, which would make such mailings presumptively violative of rule 1-400 unless the envelope bears an "advertising" notation to enable the recipient to distinguish such advertising from actual legal correspondence. The regulation of mailings found in current rule 2-101(B) has not been included because any risk of intrusion and overreaching with mailings can be greatly reduced by requiring an advertising notation on the envelope and because the constitutionality of regulation of mailings such as that found in current rule 2-101(B) is in doubt.

Paragraph (B) also includes in the definition of solicitation communications initiated by the member directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication. This express prohibition is new and is intended to prevent interference with an already existing attorney-client relationship. A client would not be prevented from seeking a "second-opinion" on their matter because

the proposed rule only prohibits contacts initiated by the attorney.

Paragraph (C) includes a new provision intended to clarify the inapplicability of the rule to contacts with present or former clients where such solicitations are in discharge of a member's continuing professional duties (e.g., alerting an estate planning client of a change in tax laws and offering to rewrite his or her will).

The restriction found in current rule 2-101(C) on situations in which someone other than the attorney does the soliciting for the attorney is not expressly included in the proposal because Business and Professions Code section 6150 et seq. already address the runner or capper aspect and proposed subdivisions (B) and (C) refer to communications initiated or made "by or on behalf of" the member or firm.

Paragraph (D) carries forward the regulations on the content of "communications" found in current rule 2-101(A).

Rule 1-400(E) carries forward the concept of rule 2-101(D) in which the Board of Governors may formulate and adopt standards as to what "communications" will be presumed to violate this rule.

Standard (1) amends slightly existing standard (1) to encompass any guarantee etc., about any representation of a client rather than limiting the presumption to guarantees etc., concerning legal action.

Standard (2) would continue the protection afforded by existing standard (2), which provides that communications which contain testimonials or endorsements violate the rule. However, this standard had been amended to provide that such a communication would not be *presumed* to violate the rule if a disclaimer such as that quoted in the standard were included in the communication. Of course, such a communication may violate the rule even if a disclaimer is included (e.g. a communication containing a testimonial which included false statements).

Current standard (3) provides that communications delivered in person or by telephone to a potential client in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment are presumed to violate this rule. Proposed standard (3) continues the presumption in current standard (3) and expands it to protect the particularly vulnerable client irrespective of the method of communication and to provide a nexus between the standard and the knowledge of the member.

Standard (4) is identical to existing standard (4), which provides that communications transmitted at the scene of an accident or at or en route to a hospital is presumed to violate this rule.

Standard (5) provides that certain mailed communications are presumed to violate the rule if not identified as advertisements on the envelope. (See *Leoni v. State Bar* (1985) 39 Cal.3d 609, 627.) This is because an

envelope bearing only the return address of a member or law firm without the advertisement disclaimer may cause the recipient to fear legal action. Mailings that have the disclaimer protect the recipient from having to discern the commercial intent through content alone.

Standards (6) through (8) were included to clarify areas of concern which are frequently raised with respect to firm or trade names, and the use of the term "of counsel."

Standard (9) is new and was added because multiple trade names may be misleading because each trade name used may imply to the public the existence of a separate and distinct entity.

Standard (10) is new and was added after a great deal of comment regarding the problems created by members advertising as lawyer referral services when in fact there is only one member taking all the cases.

Rule 1-400(F) has carried forward the requirement of retaining a copy of any "communication" or recording made pertaiing to the attorney from rule 2-101(E), but the time for retention of such copies has been extended from one to two years. This is consistent with the policy advocated by the American Bar Association in its Model Rule 7.2(b) and is better suited to serve the interest of the public and the State Bar in having a documentary basis for reviewing attorney conduct under this rule.

* * *

APPENDIX E

NOTIFICATION BY STATE BAR REVIEW DEPARTMENT

Presiding Referee of the State Bar Court
WILLIAM R. MACKEY
333 BUSH STREET,
SUITE 3400
SAN FRANCISCO, CA
94104-2878
TELEPHONE (415) 772-6000

THE STATE BAR
OF CALIFORNIA

July 7, 1987

Mark Howard Oring, Esq.
9401 Wilshire Boulevard
Suite 650
Beverly Hills, CA 90212

In re: 84-O-131 LA (LA 3841)

In the Matter
of Mark Howard
Oring

(State Bar Investigation)

Dear Mr. Oring:

On May 28, 1985, this office advised you that the above-numbered matter would come before the Review Department of the State Bar Court for review. At that time, we served upon you a copy of the Decision. Enclosed herewith is a certified copy of the Minutes of the Review Department meeting held on April 2 and 3, 1987 insofar as it relates to the above-entitled matter. As a result, the State Bar Court has ordered that you be publicly reproved.

Accordingly, pursuant to the provisions of Rule 615 of the Rules of Procedure of the State Bar, you are hereby publicly reproved by the State Bar.

An appropriate notation is being made in the public records of the State Bar of the State Bar Court's action. The fact that you have been publicly reproved and the records of the proceeding upon which the reproval is based are a matter of public record.

You may, if you so desire, seek Supreme Court review of the State Bar Court's action. I am enclosing copy of Sections 6083(b) and (c), Business and Professions Code and Rule 952(c) and (e), California Rules of Court. No further notice of the decision will be given you.

Very truly yours,

/s/ William R. Mackey
William R. Mackey
Presiding Referee

WRM:cg
Enclosures
cc: Theodore A. Cohen, Esq.
Erica Tabachnick, Attorney at Law

SUBSECTIONS (b) AND (c) OF SECTION 6083 BUSINESS AND PROFESSIONS CODE

Section 6083.

(a) . . . .[Relates to petition for review of recommendation for suspension or disbarment].

(b) A petition to review or to reverse or modify any decision reproving a member of the State Bar, or any action enrolling him as an inactive member pursuant to Section 6007 of this code or refusing to restore him to active membership, pursuant to such section may be filed with the Supreme Court by the member within 60 days after service upon him of notice of such decision or action.

(c) Upon such review the burden is upon the petitioner to show wherein the decision or action is erroneous or unlawful.

RULE 952, CALIFORNIA RULES OF COURT

Rule 952.

(a) [Review of recommendation of disbarment or suspension].

(b) [Review of State Bar recommendation to set aside stay of suspension].

(c) [Review of other decisions) A petition to the Supreme Court to review any other action of the Board of Governors of The State Bar, or of any board or committee appointed by it and authorized to make a determination pursuant to the provisions of the State Bar Act, shall be filed within 60 days after written notice of the action complained of is mailed, postage prepaid, to the petitioner, addressed to him at his last known address appearing on the records of The State Bar. The petition shall be verified, shall specify the grounds relied on and shall be accompanied by the petitioner's brief and proof of service on The State Bar of three copies of the petition and the brief. Within 10 days after service of the petition,

The State Bar may serve and file an answer and brief. Within 5 days after service of the answer the petitioner may serve and file a reply. If a review is ordered by the Supreme Court, The State Bar, within 45 days after the filing of the order, may serve and file a supplemental brief. Within 15 days after service of such brief the petitioner may file a reply brief, of which three copies shall have been served on The State Bar.

(d) [Application for readmission or reinstatement].

(e) [Service on State Bar] Any petition or other matter to be served on or filed with The State Bar under this rule shall be served on or filed with The State Bar at its San Francisco office.

Supreme Court, U.S.
FILED
AUG 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF CALIFORNIA IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

BRIEF OF APPELLANT

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QUESTION PRESENTED

1. Whether, for purposes of lawyer discipline, Rule 2-101 of the Rules of Professional Conduct of the State Bar of California and the Standard promulgated by the Board of Governors of the State Bar pursuant to such rule, which create a presumption that "testimonial" advertising by attorneys is false, misleading or deceptive, violate the Free Speech Clause of the First Amendment of the Constitution of the United States because:

a. they impermissibly shift the burden of proof to the accused attorney to show that the "testimonial" advertising is not false, misleading or deceptive; and

b. as applied, they constitute a "blanket ban" on "testimonial" advertising?

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No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF CALIFORNIA

BRIEF OF APPELLANT MARK H. ORING

OPINIONS BELOW

On June 2, 1987, the Review Department of the State Bar of California convened "In the Matter of Mark H. Oring," and resolved as follows:

> "*RESOLVED* that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted."

Four referees voted "NO" on the adoption of such resolution, based upon their belief that the presumption and/or Rule 2-101(D) was unconstitutional. A copy of the Minutes of the Review Department are printed in Appendix "A" to the Jurisdictional Statement, App. 1.

This resolution overruled the December 5, 1984, decision of the Hearing Panel of the California State Bar Court, which unanimously agreed that Appellant was not culpable because Rule 2-101 was unconstitutional. A copy of the panel's findings of fact and recommendation is printed in Appendix "B" to the Jurisdictional Statement, and a transcript of that hearing is included as Joint Appendix "B" to this Brief, J.A. 2.

Appellant petitioned the California Supreme Court for a writ of review which was denied October 28, 1987. The order denying the petition is reproduced in Appendix "C" to the Jurisdictional Statement, App.7.

JURISDICTION

This appeal arises from a disciplinary action brought by the State Bar of California against the Appellant. On June 2, 1987, the Review Department of the State Bar of California resolved that Appellant should be publicly reproved. The California Supreme Court entered its order denying Appellant's petition for writ of review on October 28, 1987, and thus upheld the constitutionality of the California State Bar's Rule of Professional Conduct, 2-101 and the contested Standard.

Appellant filed his notice of appeal with the California Supreme Court on January 7, 1988. A copy of said notice is printed in Appendix G to the Jurisdictional Statement, App. 21.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2). As in *Lathrop v. Dohahue*, 367 U.S. 820 (1961). Rule 2-101 and the Standard promulgated by the Board of Governors pursuant to such rule, represent state "statutes," legislative in character, the constitutionality of which appellant has challenged at each stage of the proceedings below. Since Appellant has been penalized for violating these provisions, jurisdiction by appeal is proper.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

"Congress shall make no law *** abridging the freedom of speech, or of the press ***"

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

Rule 2-101 of the Rules of Professional Conduct of the State Bar of California:

Professional Employment

This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

(A) A "communication" is a message concerning the availability for professional employment of a member or a member's firm. A "communication" made by or on behalf of a member shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly or by context, that it is a "communication"; or

(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal

Specialization pursuant to a plan for specialization approved by the Supreme Court; or

(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

. . .

(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what "communications" will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

Standard adopted by the California State Bar Board of Governors pursuant to Rule 2-101:

"A 'communication' which contains testimonials about or endorsements of a member is presumed to violate Rule 2-101, Rules of Professional Conduct."

STATEMENT OF THE CASE

HOW THE FEDERAL QUESTION WAS RAISED

During the proceedings in the lower tribunals and again in the California Supreme Court, Appellant had

properly drawn in question the validity of a state "statute" on the ground that it had violated the First and Fourteenth Amendments. Although the lower tribunal held in Appellant's favor, a majority of the Review Department of the State Bar concluded the contested provision was valid. The California Supreme Court denied Appellant's petition for writ of review. This Court noted probable jurisdiction on June 30, 1988.

STATEMENT OF FACTS

Appellant, Mark Oring, and his then partner, David Grey, engaged in a radio advertising program for professional employment which used the following statement of Sharon S.:

"I was rear ended on the San Diego Freeway and all my medical bills were piling up and *the insurance company was giving me a hard time, constantly harassed me, just all in all gave me a bad time.* I contacted an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey and Oring. They immediately took the case and we finally ended up in Court. I got a nice award of money and all of a sudden I got a phone call from Grey and Oring. *They hadn't liked the way the insurance company had treated me and they wanted to take them to trial* and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I would definitely go back to Grey and Oring. I certainly do believe that." (emphasis added).

This message was followed by an announcer adding:

> "Grey and Oring. That's G-r-e-y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey and Oring, 558-8000. There's no charge for consultation. 558-8000."

Although there were no consumer complaints against the advertising, an informal preliminary investigation was held before Referee Jerry Craig on November 10, 1981. Referee Craig made the following determination: (1) the advertisement was a testimonial; (2) The presumption that a testimonial was presumed to violate Rule 2-101(D) was unconstitutional; (3) There was no evidence produced by the State Bar that suggested that the advertisement was in fact misleading, and; (4) as such, there were insufficient facts to warrant further proceedings. A copy of Referee Craig's decision is printed in Joint Appendix "A" to this Brief, J.A. 1.

The State Bar requested further proceedings from the Board of Governors' Committee on Adjudication and Discipline contending that an Investigation Department Referee was not authorized to determine the constitutionality of the Rules of Professional Conduct.

Inasmuch as the State Bar failed to take any action for 20 months, Oring's then partner, David Grey, filed a Petition for Review of State Bar's action with the California Supreme Court in November, 1983 (LA 31386). On March 28, 1984, that court issued its order denying the Petition but ordered the State Bar to proceed or dismiss the case. In April, 1984, the State Bar filed a Notice to Show Cause.

On December 5, 1984, the parties entered into the following stipulations:

(1) A "Stipulation as to Facts and Disposition" including these factual agreements:

> "4. The Statement of Sharon S. *were extemporaneous and were true and reflected her actual experience as a client* of Grey and Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and *neither they nor any lawyer from their office was present at the time the radio spot was recorded.*" (Emphasis added).
>
> "It is acknowledged and understood by the parties hereto that the within Stipulation As To Facts and Disposition *is subject to review* by the Review Department of State Bar Courts and the California Supreme Court. It is further acknowledged and understood by the parties that the within stipulation as to recommended disposition is *not binding* upon the California Supreme Court." (Emphasis added).

The parties agreed to a punishment consisting of a public reproval, subject to the second stipulation below. (A copy of the "Stipulation as to Facts" is printed in Appendix "D" to the Jurisdictional Statement, App. 8.)

(2) A "Stipulation Re: Filing and Force and Effect of 'Stipulation as to Facts and Disposition Etc,' " wherein it was agreed that the Stipulation as to Facts and Disposition would be of no force or effect unless and until a final disciplinary order was made and entered against Appellant's then partner, David Grey. Further, such Stipulation stated that Appellant would not be disciplined if his then partner was exonerated. (A copy of the "Stipulation Re: Filing and Force and Effect o. 'Stipulation as to Facts and

Disposition' " is printed in Appendix "E" to the Jurisdictional Statement, App. 12.)

On December 5, 1984, a formal hearing was held before three referees, Lloyd Reed, James L. Kellner, and Barry J. Post. The State Bar presented no evidence. Upon consideration of the file, all papers filed on behalf of all parties, and oral argument, the panel unanimously agreed that Appellant was not culpable because Rule 2-101 was unconstitutional. (See Appendix "B" to the Jurisdictional Statement, App. 5.) (A copy of the transcript of the hearing before this panel is printed in Joint Appendix "B" hereto, J.A. 2.)

Pursuant to the State Bar's request for review, a hearing was held before the Review Department of the State Bar Court on August 28, 1985. By a vote of 5-4, with three referees abstaining, Standard (2) was held to be constitutional as applied to Appellant's partner, David Grey, and it was resolved that David Grey be publicly reproved. (See Appendix "F" to the Jurisdictional Statement, App. 14.)

After the Review Department's disciplinary order regarding David Grey became final, the twelve member Review Department reconvened In the Matter of Mark H. Oring, and on June 2, 1987, a majority, 8 members, resolved as follows:

> "*RESOLVED* that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted."

Four referees voted "NO" on the adoption of such resolution, based upon their belief that the presumption and/or Rule 2-101(D) was unconstitutional. (See Appendix "A" to the Jurisdictional Statement, App. 1.)

By letter dated July 7, 1987, the Presiding Referee of the State Bar Court notified Oring that he had been publically reproved and that such reproval would be noted in the public records of the State Bar. The letter also advised Oring of his right to seek California Supreme Court review of the State Bar's action and enclosed copies of the California statutes and rules governing Petitions for Review in the Supreme Court. (A copy of the letter imposing the public reproval and enclosures are printed in Joint Appendix "E" to this Brief, J.A. 18.)

Appellant petitioned the California Supreme Court for a writ of review. On October 28, 1987, the California Supreme Court denied the petition, thereby upholding the disciplinary rules against Appellant's challenge. (See Appendix "C" to the Jurisdictional Statement, App. 7.)

The State Bar's Committee Report to its Board of Governors provides what is allegedly the State Bar's reasoning behind the presumption at issue here.

> "Testimonials are inherently deceptive and misleading because past performance of an attorney is no indication of future performance, and because no lawyer can guarantee the results of any legal action." "Advertising of acquittals or large verdicts may lead the public to believe that the likelihood of obtaining a similar result is high if the services of this particular attorney are obtained, and ignores the importance of facts, applicable law, and an attorney's selective choice of clients in determining the outcome of a case." (See State Bar Motion to Dismiss or Affirm, p. 22.)

Recent Developments:

In December 1987, the State Bar adopted and forwarded to the California Supreme Court for approval a new proposed rule and standards regarding testimonials. Standard 2 provides that testimonials are included in communications which are presumed to be false, misleading or deceptive, "unless such communication also contains an express disclaimer such as 'this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.' " (A copy of the proposed rules and standards is printed in Joint Appendix "C" hereto, J.A. 8.)

The California State Bar report submitted with the new proposed rules provides, in pertinent part:

> "The recent rejection of the certiorari petition in *Grey v. State Bar of California* . . . certiorari denied 107 S.Ct. 885 (Jan. 1, 1987) suggests that the United States Supreme Court is, at least presently, willing to permit states to adopt a fairly strong pro-regulation standard in weighing the competing interests of attorneys and the public;"
>
> . . .
>
> "Standard (2) would continue the protection afforded by existing standard (2), which provides that communications which contain testimonials or endorsements violate the rule. However, this standard had been amended to provide that such a communication would not be *presumed* to violate the rule if a disclaimer such as that quoted in the standard were included in the communication. Of course, such a communication may violate the rule even if a disclaimer is included (e.g. a communication containing a testimonial which included false statements)."

A copy of this State Bar report is printed in Joint Appendix "D" hereto, J.A. 12.

SUMMARY OF ARGUMENT

Under California law as it now exists, an attorney who utilzes testimonial advertising must bear the burden of proving that his advertisement is not false, deceptive or misleading. Appellant, Mark H. Oring, was publicly reproved for utilizing a non-deceptive, admittedly truthful testimonial radio advertisement which informed the public about a client who received a settlement because of insurance company "bad faith" practices. Under the governing principles this Court has clearly enunciated in prior commercial speech decisions, the judgment imposing a public reproval upon the Appellant cannot stand.

In *Shapero v. Kentucky Bar Association*, ___ U.S. ___, 108 S.Ct. 1916 (1988), this court stated the general rule regarding the constitutionality of commercial speech restrictions as follows:

> " 'Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.' " Since state regulation of commercial speech 'may extend only as far as the interest it serves,' state rules that are designed to prevent the 'potential for deception and confusion- . . . may be no broader than reasonably necessary to prevent the' perceived evil." ___ U.S. ___, 108 S.Ct. at 1921. (Citations omitted.)

Testimonial advertising is subject to First Amendment protection because it is not inherently misleading. It

serves the same important communicative functions this Court set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), attracting the audience's attention to the message, perhaps because someone other than the advertiser himself is promoting the product or service in question, and imparting information directly. Here, the advertisement informed the public about a cause of action based on an insurance company's breach of the covenant of good faith. *Zauderer*, 471 U.S. at 646.

While the current ABA Model Code would seem to preclude such advertising (Section 7.1), it permits the advertisement of names of regularly represented clients. (Section 7.2). But the listing of a regular client, e.g., I.B.M., is a tacit endorsement.

Moreover, testimonial advertising is the 20th century equivalent of the traditional method of obtaining clients based on reputation in the community. *Bates v. State Bar of Arizona*, 433 U.S. at 374, n. 30 (1977); Murdock and Linenberger, *Legal Advertising*, 16 *Land and Water Law Review* 627, 677).

The testimonial at issue here is subject to First Amendment protections because radio advertising should not be subject to any lesser degree of protection than that afforded print media. In *In re Petition of Rule of Court*, 564 S.W.2d 638, 643 (1978), the Tennessee Supreme Court observed that there were 40 million functionally illiterate American citizens, and stated "[i]f the public is to be served by lawyer advertising, illiterates and functional illiterates . . . must have a means of access to that advertising." Based on this sound reasoning, Rule 7.2 of the 1983 Model Rules of Professional Conduct of the

American Bar Association permits radio and television advertising.

The testimonial here did not mislead the public. The California State Bar stipulated that the testimonial at issue here was true, and an advertisement's truth is relevant to the issue of deception. See, *In re R.M.J.*, 455 U.S. 191 at 203 (1982). Further, although there has never been a finding that the advertisement in this case is misleading, the effect of the presumption here impermissibly punishes Appellant "in the absence of a finding that his speech was misleading." *In re R.M.J.*, 455 U.S. 207.

The advertisement is not of the type that "unduly emphasizes trivial or 'relatively uninformative fact[s]' " *Shapero, supra* 108 S.Ct. at 1925. It tells the true story of a woman who was "rear ended" in an automobile accident and constantly harassed by the insurance company involved. Like the information regarding the fact that the statute of limitations on filing lawsuits against the maker of the Dalkon Shield might not as yet have run (*Zauderer*, 471 U.S. at 640), this information is of vital interest to consumers because it tells them about California's "bad faith" cause of action. *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691 (1979).

The State's asserted interest in regulating testimonial advertising is said to be the prevention of false, deceptive and misleading advertising. While the State Bar of California has an interest in preventing attorney practices which are '[r]ife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud' " (*Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916 at 1922), testimonial radio advertisements are

not among such practices. The "record in this case fails to reveal a single instance" of actual experience demonstrating the advertisement at issue here was deceptive. *Zauderer*, 471 U.S. at 660 (Brennen, J., concurring and dissenting). And the California State Bar Committee Report contains the cursory and "highly speculative" arguments that Justice Brennan deemed "an unacceptable substitute for the reasoned evaluation that is required when regulating commerical speech." *Id.* at n.4.

The presumption that any "testimonial" is misleading is broader than reasonably necessary to prevent the perceived evil and is contrary to this Court's statement that one seeking to uphold a restriction on commercial speech should bear the burden of proving that such speech is unprotected. See, e.g., *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983).

The presumption that "testimonials" are misleading is not the "preferred remedy" (*In re R.M.J.*, 455 U.S. 191 at 201 (1982)), because it serves to prevent the disclosure of information, rather than promote such disclosure. And both *In re R.M.J.* and *Shapero* suggest inserting disclaimers or requiring filing of a copy of the advertisement with the State for prior approval, as less onerous alternatives. See *In re R.M.J.*, 455 U.S. at 206. Since "[t]here is no indication in the record of a failed effort to proceed along such a less restrictive path" (*Id.*), the presumption at issue here violates the First Amendment.

Additionally, the effect of the presumption that testimonials are misleading fails to afford an attorney due process. As in *Speiser v. Randall*, 357 U.S. 513, 562 (1958), "[t]he vice of the present procedure is that, where the

particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding – inherent in all litigation – will create the danger that the legitimate utterance will be penalized." Unlike other less burdensome alternatives, it "forces [an attorney] to steer far wider of the unlawful zone" *Id.* and punishes him even when the evidence indicates that it is as likely as not that his advertising is not misleading. *Mullany v. Wilbur*, 421 U.S. 684 at 703 (1975).

ARGUMENT

Since the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which this Court held that the First Amendment precludes certain forms of regulation of purely commercial speech, this Court has had occasion to address the constitutionality of a variety of restraints on advertising and solicitation by attorneys. See *Shapero v. Kentucky Bar Association*, ___ U.S. ___, 108 S.Ct. 1916 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys: whether a State may discipline an attorney for advertising consisting of truthful "testimonials" by former clients, and whether the State may establish a presumption that any such "testimonials" are misleading. Under the governing principles this Court has clearly

enunciated in *Bates, In re R.M.J., Zauderer, Shapero*, and other commercial speech decisions, the California State Bar's presumption that testimonial advertising is deceptive or misleading cannot stand.

Last term, in *Shapero*, this Court stated the general rule in the context of commercial advertising by lawyers to be as follows:

> " 'Commercial speech that is not false or deceptive and does not concern unlawful activites . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.' " Since state regulation of commercial speech 'may extend only as far as the interest it serves,' state rules that are designed to prevent the 'potential for deception and confusion . . . may be *no broader than reasonably necessary to prevent the' perceived evil.*" ___ U.S. ___ 108 S.Ct. at 1921; *emphasis added* citations omitted.

The State Bar regulations here are far broader than necessary to achieve the governmental interest asserted. Furthermore, they impose a constitutionally impermissible burden upon the advertiser, who is required to assume the burden of establishing the protected nature of the communication, in violation of both the First and Fourteenth Amendments. *Speiser v. Randall*, 357 U.S. 513 (1958).

I.

LAWYER ADVERTISING IS SUBJECT TO FIRST AMENDMENT PROTECTIONS.

Primarily because of the importance to the consumer of the free flow of commercial information, this Court

first recognized that commercial advertising is entitled to First Amendment protections in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-771 (1976). From the time of that decision until the present, this Court has many times spoken about the importance of the free flow of commercial information and the policy that consumers should be entitled to more, rather then less, information.

This Court first applied these policies to attorney advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), holding that attorney advertising cannot be subject to blanket suppression but that advertising that is false, deceptive, or misleading may, of course, be subject to restraint. 433 U.S. at 383. Bates' "legal clinic" advertisement offering "very reasonable" prices was held to be protected advertising. The reasoning in *Bates*, upholding the free dissemination of truthful information regarding attorney's services, applies with equal force to the Court rule and testimonial at issue here.

In *In re R.M.J.*, 455 U.S. 191 (1982), this Court applied the four-part test set forth in *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980),[1] holding that an attorney could not be disciplined

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[1] This four-part test was described as follows:
"At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

for certain deviations from the precise listings of areas of practice which were permitted by the Missouri Bar and for identifying the jurisdictions in which he was licensed to practice. Even though identifying jurisdictions of practice "could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court" (455 U.S. at 205), this Court held the communication was protected because "[t]here is nothing in the record to indicate that the inclusion of this information was misleading.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court held the state of Ohio could not ban advertisements containing illustrations or advice and information regarding specific legal problems. The State's contention that illustrations were inherently deceptive and difficult to police was deemed insufficient to justify a blanket ban on such advertising.

And in its latest attorney advertising decision, *Shapero v. Kentucky Bar Association*, ___ U.S. ___, 108 S.Ct. 1916 (1988), this Court held that the state of Kentucky could not categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthfull and nondeceptive letters to potential clients known to face particular legal problems.

Based on this Court's prior decisions, in determining the constitutionality of the California State Bar's presumption that testimonial advertising is misleading, we must first determine whether testimonial advertising is inherently misleading or whether the record demonstrates that such form of advertising has, in fact, been

deceptive. *In re R.M.J.*, 455 U.S. at 202. As we shall demonstrate below, testimonial advertisements are not inherently likely to deceive since they can be truthful and informative, and the record is devoid of any evidence or findings to the effect that the testimonial advertisement at issue in this case is deceptive.

A. TESTIMONIAL ADVERTISING IS SUBJECT TO FIRST AMENDMENT PROTECTIONS BECAUSE IT IS NOT INHERENTLY MISLEADING.

Among this Court's relevant cases, perhaps the closest analogy to California's presumption against testimonials was Ohio's ban on illustrations at issue in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). There, the Office of Disciplinary Counsel stipulated that the information and advice concerning Zauderer's advertisement was not false, fraudulent, misleading, or deceptive and "that the drawing was an accurate representation of the Dalkon Shield."[2]

Like California's presumption that testimonials are misleading, etc., Ohio restricted the use of illustrations in advertising, alleging that they were inherently deceptive;

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[2] Although the drawing was an accurate picture and the parties stipulated that the advertisement was not deceptive, the drawing was claimed to deceive the public. Likewise, here, although the State Bar of California stipulated that Oring's advertisement was extemporaneous, true and reflected the client's actual experiences, the State Bar claims that his advertisement is misleading.

yet, this Court held the First Amendment did not allow for a "blanket ban" on illustrations, finding that the use of illustrations serves important communicative functions. Such advertising "attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." 471 U.S. at 647.

Likewise, testimonial advertising serves these same important communicative functions, attracting the audience's attention to the message, perhaps because someone other than the advertiser himself is promoting the product or service in question. Such advertising also imparts information directly, particularly where, as here, the advertisement informs the public about a cause of action based on an insurance company's breach of the covenant of good faith.

The effect of testimonial advertising on the legal profession has been considered on numerous occasions. While the current ABA Model Code would seem to preclude testimonials (Section 7.1), it permits the advertisement of names of regularly represented clients. (Section 7.2). Such a distinction makes no logical sense. Wouldn't the list of corporate clients be used to actually demonstrate the lawyer's "past performance," and guarantee future performance, more than the testimonial at issue here? Certainly, a potential client would be more impressed by an advertisement stating that an attorney represents the largest corporations in the United States, e.g., IBM, United Air Lines, Standard Oil of Ohio, rather

than by hearing the "anonymous" story of a satisfied client.[3]

Actually, the testimonial here is more informative than a listing of regularly represented clients because it supplies information about "bad faith" insurance practices, and this Court has always looked with favor upon advertisements that serve to inform the public about their legal rights and remedies. See, e.g., *Zauderer*, 471 U.S. at 646: "The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising – *indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising.*" (emphasis added).

Commentators have concluded that testimonials "greatly help consumers." Moss, *supra* at 621. Yet, the California State Bar is concerned that a statement of satisfaction by a former client will mislead the public into believing that similar results can be obtained for them. (See Committee Report to the Board of Governors of the State Bar, Appellee's Motion to Dismiss or Affirm, p. 22 and Statement of the Case, supra).

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[3] See, Moss, *The Ethics of Law Practice Marketing*, 61 *Notre Dame Law Rev.* 601, 619 (1986): "It is clear that the Model Rules continue to draw a distinction between listing regularly represented clients on one hand, and endorsements on the other, although the reason for the distinction may be difficult to perceive in some instances. . . . The listing of a regular client is a tacit endorsement and an implicit claim of competence, if not of expertise, where the client is the kind who obviously could command the highest quality legal assistance in a specialized area of the law."

As stated in Moss, supra, at 621, "[t]here seems to be no proof justifying this assumption. *If the public were that easily seduced and manipulated, then we would look with similar concern at the commonplace television advertising of insurance companies whose clients, standing amid the wreckage of homes recently blown away by tornadoes, tell us how happy they are to have been insured by the advertiser.*" (*Emphasis added.*) No reasonable person would believe that the insurance company testimonial is a "guarantee."[4]

Since testimonial advertising does not involve the immediate "yes-or-no" response required by virtue of the overbearing in-person solicitation in *Ohralik*, consumers can verify the information presented in the advertisement simply by consulting other sources. One noted commentator has stated:

> "Paternalistic judgments of the consumer's ability to evaluate subjective information are unnecessary. In fact, an experiment involving legal advertising found that practitioner attributes . . . had no significant effects on the purchase probabilities or attitudes of respondents." Murdock, *supra* at 677, see also, Kuehl and Ford, *The Promotion of Medical and Legal Services: An Experimental Study, Contemporary Marketing Thought*: 1977 Educator's Proceedings 39-44 (Greenberg and Bellenger, eds. 1977).

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[4] Testimonials by famous personalities are used to promote a multitude of products, e.g., Diet Pepsi (Mike Tyson, boxing), McDonalds (Kareem Abdul Jabar, basketball), Cover-Girl makeup (Christie Brinkley, model). Would a reasonable woman believe she is guaranteed to look like Christie Brinkley simply because she uses Cover-Girl products?

The *evidence*, then, demonstrates that testimonials depicting a practitioner's attributes are not misleading or deceptive and do not significantly affect purchase probabilities of a consumer.[5] Conversely, the source of the information, e.g., the fact that the attorney represents IBM, is said to significantly affect purchase probabilities. *Id.*

The courts have long recognized these realities as well. The eminent Judge Learned Hand, commenting on testimonials in *Moretrench Corporation v. Federal Trade Commission*, 127 F.2d 792, 795 (2nd Cir. 1942), stated:

> "It is extremely hard to believe that any buyers . . . could be misled by anything which was patently no more than the exuberant enthusiasm of a satisfied customer . . . [i]t is . . . hard to imagine how anyone reading [the testimonial] could have understood it as more than puffing."[6]

Certainly, the statements of Sharon S., which were extemporaneous and true, were simply this same "exuberant enthusiasm of a satisfied customer."

In *Northam Warren Corporation v. Federal Trade Commission*, 59 F.2d 196 (2nd Cir. 1932), the court overturned a cease and desist order of the F.T.C., holding that it is not misleading to fail to indicate that an "endorser" was paid

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[5] The State Bar has thus far presented absolutely no evidence supporting its claim that "[t]estimonials are inherently deceptive and misleading. . . ."

[6] See, also, *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112 (1937), which involved the use of *fictitious testimonials*. The testimonial at issue here was stipulated to be truthful.

for his indorsement because "[i]t is doubtful if the public is gullible enough to believe that such testimonials are given without compensation." *Id.* at 197. As Judge Manton reasoned:

> "While the testimonials, if having merit, may tend to increase the volume of business, still, if an honest opinion is expressed under the signature of the giver of such testimonial, the public cannot be presumed to be induced to purchase the petitioner's products in any way or manner that might be said to divert trade from competitors who do not use testimonials in advertising their products." *Id.* at 197.

This opinion, again, stresses the anti-paternalistic approach that has long been taken by the courts concerning testimonial advertising.

And at least one State Supreme Court has questioned the validity of a ban on testimonial advertising in light of this Court's holding in *Zauderer*. See *Jones v. Louisiana State Board of Dentistry*, 483 So.2d 140 (La. Supreme Court 1986).

The traditional method of obtaining clients was through word-of-mouth, i.e., reputation in the community. *Bates*, 433 U.S. at 374, n. 30; see, also, Note, *Bar Restrictions on Dissemination of Information about Legal Services*, 22 *UCLA L. Rev.* 483, 500: "Traditions which formed the basis of anti-advertising rules presumed that a potential client knew the reputations of neighborhood lawyers and could make an informed selection . . . "[7] Yet, the kind

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[7] See, also Munford, *Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys*, 62 *Virginia L.Rev.* 1135 at 1152.

of testimonial at issue here is, in effect, the modern-day equivalent of word-of-mouth referrals, simply conveying it to many more people than is possible by individual referrals alone. (Murdock and Linenberger, *Legal Advertising*, 16 *Land and Water Law Review* 627, 677) This analogy especially holds true where, as here, the client's statements made by Sharon S. were extemporaneous and true.

Attracting clients because of outstanding professional reputation serves important functions, including encouraging the attorney to do a better job for present clients in order to attract future clients, and placing of intermediaries between an attorney and his potential clients.[8] Munford, *supra*, at 1152. The testimonial at issue here serves these same functions.

Finally, the Federal Trade Commission has actually proposed guidelines for testimonial and endorsement advertising which are relevant and instructive here. 16 C.F.R. 255 *et seq*. Endorsements must reflect honest opinions and beliefs of the endorser and may not contain deceptive representations. 16 C.F.R. 255.1. The F.T.C. has not seen fit to ban testimonials, and this Court has previously looked for guidance to the F.T.C.'s efforts to eliminate deceptive practices in advertising (see *Zauderer*, 471 U.S. at 645). Testimonials, which may include an infinite

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[8] Since the in-person "intermediary" knows or has dealt with the attorney, it is said that he may have more accurate information than advertising may convey. But Sharon S. also had this more "accurate information" based on her personal satisfactory experience with the Appellant.

variety of information and opinions, are simply not inherently deceptive, and accordingly should be recognized as protected speech.

B. THE TESTIMONIAL AT ISSUE HERE IS SUBJECT TO FIRST AMENDMENT PROTECTIONS BECAUSE (1) RADIO ADVERTISING SHOULD NOT BE SUBJECT TO A LESSER DEGREE OF PROTECTION AND (2) THE TESTIMONIAL HERE IS NOT MISLEADING.

1. THERE IS NO DISTINCTION BETWEEN THE PROTECTIONS THAT SHOULD BE AFFORDED LAWYERS WHO ADVERTISE ON RADIO OR TELEVISION AND THOSE WHO UTILIZE PRINT MEDIA

Although neither *Bates v. The State Bar of Arizona*, 433 U.S. 350 (1977), nor its progeny specifically addressed the propriety of electronic advertising, First Amendment freedom of speech protection cannot apply to certain media and not to others.[9]

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[9] This Court's opinion in *Bates* did appear to leave the issue open by commenting: "And the special problem of advertising on the electronic broadcast media will warrant special consideration." (*Bates*, supra, at page 384). See also, dissent of Justice O'Connor in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 673, n.1.

Although the prior lawyer advertising cases decided by this court did not deal with broadcast media, this Court observed in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 670 that the Federal Trade Commission has not found the elimination of deceptive uses of visual media in advertising to be an impossible task. See also, *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

At least two state Supreme Courts have had occasion to deal with the issue of electronic media advertising by lawyers since *Bates*. In *In re Petition of Rule of Court*, 564 S.W.2d 638, 643 (1978), the Tennessee Supreme Court observed that "[t]his [freedom of speech] protection would be fragile indeed if it were only applied to certain media and not to others. Advertising is advertising irrespective of the devise or instrumentality employed."

The Supreme Court of Tennessee went on to point out that there were 40 million functionally illiterate American citizens,[10] and concluded that:

> "It is evident that a large segment of our society cannot profit from print media publication and must rely upon the electronic broadcast media. Again, if the public is to be served by lawyer advertising, illiterates and functional illiterates, along with the non-sighted, must have a means of access to that advertising."[11]

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[10] See, Chamberlain, *"Lawyer Advertising, Subject of Concern"*, NLADA Washington Memo 4 (Sept. 1977); Report to the Board of Governors, by Task Force, 46 *U.S.L.W.* 1,2 (August 23, 1977).

[11] *Grievance Committee For the Hartford-New Britain Judicial District v. Trantolo*, 192 Conn. 15, 470 A.2d 228 (1984), is in accord because:

> "Some members of our society are functionally illiterate. Many others, because of handicaps, financial circumstances, or personal preference, do not avail themselves of printed material. Thus television and radio are the informational media choice for many, and of necessity for others. To restrict the advertising of legal services to those

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The American Bar Association now recognizes the legitimacy of radio and television advertising by lawyers. Rule 7.2 of the 1983 Model Rules of Professional Conduct of the American Bar Association provides:

> "Rule 7.2 Advertising
>
> (a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through . . . radio or television . . . "[12]

Based on the foregoing, radio advertising, like other forms of commercial advertising, is subject to First Amendment protection.

2. THE TESTIMONIAL AT ISSUE HERE IS ADMITTEDLY TRUE, NOT MISLEADING AND SERVES AN IMPORTANT PUBLIC FUNCTION.

In determining whether an advertisement is misleading, courts first consider its literal meaning and then determine whether it conveys any implied message beyond its literal meaning. *Avis-Rent-A-Car System, Inc. v.*

(Continued from previous page)

> who read published materials would deny nonreaders important information with no corresponding benefit to them or any other segment of society."

[12] The Comment to this rule recognizes that "[t]elevision is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising therefore would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant."

Hertz Corp., 782 F.2d 381 (2d Cir. 1986). For all the reasons discussed below, the advertisement in this case is not misleading.

The State Bar stipulated that the advertisement was true. See, *Zauderer*, 471 U.S. at 639. Undoubtedly, the issue of truth is relevant to the issue of deception. See, *In re R.M.J.*, 455 U.S. at 203: "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." Thus, the fact that the advertising is true certainly presents, at the very least, evidence that the advertisement is not misleading. Additionally, there has never been a finding that the advertisement in this case is misleading.[13]

The advertisement is not of the type that "unduly emphasizes trivial or 'relatively uninformative fact[s]' " *Shapero, supra* 108 S.Ct. at 1925. It tells the true story of a woman who was "rear ended" in an automobile accident and thereafter constantly harassed by the insurance company involved. *Because of this harassment, her attorney eventually obtained an additional settlement for the client. Certainly, this information is not like the trivial or relatively*

[13] The Local Administrative Committee determined that there was no evidence produced by the State Bar that suggested that the advertisement was in fact misleading. (See Joint Appendix "A") The State Bar Hearing Panel refused to determine whether the advertisement was misleading (See Jurisdictional Statement, Appendix "B"), and the State Bar Review Department made no finding but simply relied on the fact that "Respondent failed to present evidence sufficient to rebut [Rule 2-101(D)'s] presumption." (See Jurisdictional Statement, Appendix "F" (App. 17)).

uninformative information presented in In re R.M.J. (lawyer's statement that he was a member of the Bar to the Supreme Court of the United States). It actually informs the public about breaches of the covenant of good faith by insurance companies and about the basis for bad faith liability. See, *Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 928, 148 Cal. Rptr. 389 (1978) [nature of insurance company's acts, i.e., harassment, considered in determining punitive damages]. Undoubtedly, like the information regarding the fact that the statute of limitations on filing lawsuits against the maker of the Dalkon Shield might not as yet have run (*Zauderer, supra*), this information is of vital interest to consumers. Being informed of the possibility of a cause of action for breach of the covenant of good faith by an insurance company is, undoubtedly, important. Otherwise, the vast majority of consumers might be abused by insurance companies because of ignorance, and this abuse is what led to "bad faith" causes of action in California. See, e.g., *Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 148 Cal.Rptr. 389. Thus, the testimonial at issue here "serves individual and societal interests in assuring informed and reliable decision-making." *Bates*, 433 U.S. at 364.

The State Bar makes numerous contentions in its Motion to Dismiss or Affirm (at pp. 14-24), most of which deal with the alleged deceptive nature of the advertising.[14] Yet, as we shall demonstrate, the Bar's contentions lack merit.

[14] The State Bar baldly asserts that:
"Sharon S.'s case was unique and that uniqueness was the set of underlying facts which gave rise to a bad faith cause of action against the defendant's insurance company. This

(Continued on following page)

If bad faith actions were "unique," California would not be in need of the statutory scheme it has implemented in order to combat bad faith. See Cal. Ins. Code section 790.03. To date, there have been hundreds of California appellate court decisions dealing with issues arising out of bad faith litigation. See *Shepard's California Citations*, Codes, Statute Edition, Part 4, 1988, Insurance Code Section 790.03[15]. And, Continuing Education of The Bar courses in California have featured special programs on "Bad Faith Insurance Litigation" (See, footnote 16, infra.).

Further, the California Supreme Court, in *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691 (1979), has acknowledged that "bad faith" is a matter of public interest.

> " 'The insurer's obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. . . .The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.' . . . Furthermore, *the*

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factual pattern is seldom, if ever, present in most accident cases and the cause of action that Sharon S. had (and the resulting "double" recovery) are just not available to most prospective litigants." (Motion to Dismiss or Affirm, p. 16-17).

[15] The number of *appellate* cases cited therein would, presumably, be far less than the number of cases filed in trial courts throughout the State of California, not to mention cases filed in other jurisdictions that permit bad faith actions.

> *relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position." Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d at 820-821.[16]

Certainly, the devastating effects of insurer's bad faith, coupled with the inherent imbalance in the relationship between an insured and insurer, are such that the public has a need to be informed about "bad faith."[17]

The effect of the presumption here punishes Appellant "in the absence of a finding that his speech was misleading" (*In re R.M.J.*, 455 U.S. 207), thereby violating the protections afforded by the First Amendment.

C. THE STATE'S INTEREST HERE IS NOT AS COMPELLING AS IN OHRALIK, AND THE PRESUMPTION AT ISSUE IS NOT REASONABLY RELATED TO THE PROMOTION OF THE STATE'S INTEREST IN AVOIDING FALSE, MISLEADING OR DECEPTIVE ADVERTISING.

The State asserted interest in regulating testimonial advertising is said to be the prevention of false, deceptive

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[16] See, also, "Bad Faith Insurance Litigation", California Continuing Education of the Bar, Regents of the University of California (1985) which has observed that "[a]s the doctrine of bad faith has evolved, the nature of insurance has become more clearly seen as an instrument of social policy, rather than simply a private contract between two parties of essentially equal standing."

[17] Indeed, a primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance (See, e.g. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 148-150 (1967) (opinion of Justice Harlan); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *NAACP v. Button*, 371 U.S. 476 (1963); *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1102 (1968)).

and misleading advertising.[18] While the State Bar of California has an interest in protecting the citizens of the State from attorney practices which are '[r]life with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud' " (*Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916 at 1922), testimonial radio advertisements are not among such practices and the presumption imposed here is not reasonable related to the promotion of such an interest.

This case involves basically the same state interests alleged to be at stake because of illustrations in *Zauderer*, i.e., that a blanket ban was necessary to ensure against deceptive or manipulative uses of visual media. Yet this Court declined to find those interests substantial enough to permit the "blanket ban" on illustrations. As to the risk that the public would be misled, manipulated or confused because "[a]buses associated with the visual content of advertising are particularly difficult to police . . . ," 471 U.S. at 648, this Court found that such assertions were unsupported by evidence, and that the First Amendment rights at stake were important enough such that the use of illustrations should be policed *on a case-by-case basis*. 471 U.S. at 649. Likewise, the statement by the State Bar Committee which recommended that testimonials be presumed deceptive, etc., is a general argument unsupported by any evidence. Further, there appears no reason why testimonials, like illustrations, cannot be policed on a *case-by-case basis*.

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[18] See State Bar Committee report, Statement of the Case, *supra* at p. 10.

As in *Zauderer, supra*, "the voluminous record in this case fails to reveal a single instance" of actual experience demonstrating the advertisement at issue here was deceptive. 471 U.S. at 660 (Brennan, J., concurring and dissenting). Moreover, the California State Bar Committee Report contains the cursory and "highly speculative" arguments of the type Justice Brennan deemed "an unacceptable substitute for the reasoned evaluation that is required when regulating commercial speech." *Id.* at n. 4.

Unlike the appellant in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), who telephoned one of his potential client's parents, visited one of his potential clients at the hospital and the other at home, concealed a tape recorder and recorded certain conversations with his potential clients, refused to permit one of his clients to repudiate her agreement with him after she agreed to his representation, and received two Bar complaints against him, the Appellant here engaged in no "in person" communications but merely utilized a radio advertisement,[19] and there were *absolutely no consumer complaints against the advertising*.

Admittedly truthful advertising about the availability of routine legal services can hardly be compared with Ohralik's in-person solicitation, especially considering

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[19] Again, it must be emphasized that the statements in the advertisement were extemporaneous and were concededly true and reflected Sharon S.'s actual experience as a client. (See, Jurisdictional Statement, Appendix "D,")

the circumstances surrounding Ohralik's conduct. Oring's advertisement, as in *Bates*, "simply provides information and leaves the recipient free to act upon it or not," (*Ohralik*, 436 U.S. at 457) while Ohralik's "in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* and n. 13.

Further, entirely lacking are the difficulties in enforcement of standards attendant with in-person solicitation. Testimonial advertising is *on the air and open to public inspection*. Testimonials do not involve a dangerous "one on one" confrontation between a lawyer and a "distressed" lay person with its attendant – he said this, I said that – problems. 433 U.S. at 466 and n. 28.

Because the interests at stake are not as substantial as those in *Ohralik*, and because this Court, in *Zauderer*, has dispensed with "blanket bans" based on interests asserted by the State here, the California State Bar's evidentiary presumption at issue here is not reasonably related to the promotion of an important State interest.

D. THE PRESUMPTION AT ISSUE IS BROADER THAN REASONABLY NECESSARY TO PREVENT THE PERCEIVED EVIL.

Rule 2-101(D) provides that the Board of Governors of the State Bar shall establish standards as to what communications will be presumed to be false, deceptive or which tends to confuse, deceive or mislead the public. Pursuant to this Rule, the Board determined that testimonials would be included in this category, i.e., the attorney who advertises by a testimonial must bear the

burden of proving that his advertisement is not false, deceptive or misleading.

The presumption at issue violates the principles established by a long line of this Court's decisions. It is not only a more restrictive path than reasonably necessary, it is, in effect, an outright ban because of the difficulties the attorney encounters in proof of his innocence. This Court has stated that *one seeking to uphold a restriction on commercial speech should bear the burden of proving that such speech is unprotected* (see, e.g., *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60, 71 (1983)), where "a more limited restriction on the content of promotional advertising would . . . serve adequately the State's interests." *Central Hudson Gas and Electric Corp.*, 447 U.S. at 570.

The presumption at issue here forces an attorney to produce evidence sufficient to overcome a presumption that his advertisement is false, misleading or deceptive, in an apparent attempt by the State "simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." *Zauderer*, 471 U.S. at 646. But, at this Court stated in *Zauderer*:

> "The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on the would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Id.* at 647.

To place the burden upon an attorney to demonstrate that his advertisement is not false, misleading, or harmful

places the cost of distinguishing the helpful from the misleading upon the attorney, thereby eroding First Amendment protections which this Court has deemed valuable. The effect of shifting the burden of proof constitutes a blanket ban, something this Court has approved only in cases of extreme overreaching. See *Ohralik, supra.*

In seeking to sustain a prophylactic rule against certain forms of advertising in *Zauderer,* the State urged that "it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services." 471 U.S. 644-645. Yet this Court refused to follow that reasoning for several reasons, all of which are applicable here. The statements involved here are easily verifiable and completely accurate.[20] And although distinguishing deceptive from non-deceptive *legal* advertising may not always be a simple task, as this Court has pointed out:

> "Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. . . .15 U.S.C. 45 (a)(1) reveals that distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex

[20] The State Bar of California stipulated that Oring's advertisement was true and reflected his client's actual experience.

> and technical factual issues and the consideration of nice questions of semantics." 471 U.S. at 645.[21]

Thus, *Zauderer* emphasizes that the State should bear the burden of distinguishing the deceptive from the non-deceptive and the helpful from the misleading.

And a recent Federal Trade Commission Staff Report, "Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising," 145-149 (1984) concludes that the application of a "false or deceptive" standard to attorney advertising would not pose problems distinct from those presented by the regulation of advertising generally. *Zauderer,* 471 U.S. at 646, n. 13.

Other decisions of this Court are in accord. In *In re R.M.J.* 455 U.S. 191 (1982), this Court affirmed that the " 'preferred remedy is more disclosure, rather than less.' " 455 U.S. at 201. But the presumption at issue here serves to prevent the disclosure of information, rather than promote such disclosure.

Both *In re R.M.J.* and *Shapero* suggest less burdensome alternatives, including disclaimers or filing of a copy of the advertisement with the State so that it can exercise reasonable supervision over the advertising. See *In re R.M.J.* 455 U.S. at 206. Since "[t]here is no indication in the record of a failed effort to proceed along such a less

[21] Yet, the Federal Trade Commission bears the burden of demonstrating that an advertisement is deceptive. See *Montgomery Ward and Co. v. F.T.C.* 379 F.2d 666 (7th Cir. 1967).

restrictive path" (*Id.*), the presumption at issue here is violative of the First Amendment.[22]

In the context of lawyer advertising, the Supreme Court of Wisconsin has interpreted this Court's holding in *In re R.M.J.* as requiring the burden of proof in a lawyer disciplinary proceeding to be borne by the party seeking to impose that discipline. In *In the Matter of Disciplinary Proceedings Against Jack L. Marcus*, 107 Wis.2d 560, 320 N.W.2d 806 (1982), the Wisconsin Supreme Court affirmed an order dismissing complaints of professional misconduct filed against attorneys based on certain newspaper advertising, stating:

> "In light of *R.M.J.*, we interpret [the disciplinary rule] and its predecessor as requiring the party which is seeking to have discipline imposed to bear the burden of proving by clear and satisfactory evidence that the advertisement violates the rule." *Id.*

The California State Bar Committee Report which states that testimonials are inherently deceptive because "past performance of an attorney is no indication of future performance . . . " (Statement of the Case, *supra*) is similar to the ABA's contention in *Shapero* that target mailings could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case. Yet, the *Shapero* Court discarded such an argument, stating:

> "merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated

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[22] The recently proposed California State Bar Rule (Joint Appendix C) permits testimonial advertising so long as it is not misleading and includes a disclaimer.

> abuses or mistakes does not justify a total ban on that mode of protected commercial speech."

Similarly, even if testimonials present lawyers with opportunities for isolated abuses, that, in itself, cannot not justify their total ban or anything other than a narrowly tailored restriction. Since the presumption at issue here is not narrowly tailored and since this Court has suggested several more narrowly tailored restrictions, none of which were tried before the implementation of this presumption, Rule 2-101(D) violates the First Amendment protections afforded commercial speech.

II.

THE EFFECT OF THE PRESUMPTION THAT TESTIMONIALS ARE MISLEADING FAILS TO AFFORD AN ATTORNEY DUE PROCESS BECAUSE IT REQUIRES THE ATTORNEY TO OVERCOME AN ALMOST INSURMOUNTABLE BURDEN OF PROOF.

At the threshold, it must be remembered that disciplinary proceedings brought against an attorney are adversary proceedings of a quasi-criminal nature. *In re Ruffalo*, 390 U.S. 544, 551 (1968).[23] Even where the disciplinary authorities have imposed a punishment of less than a public reprimand on a lawyer, this Court has not hesitated to reverse where an attorneys constitutional rights have been violated (See, *In re R.M.J.*, 455 U.S. at 198; *In re Primus*, 436 U.S. 412, 421; *Bates v. State Bar of Arizona*, 433 U.S. at 358; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 669, Justice Brennan concurring).

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[23] See, also, *Giddens v. State Bar* 28 Cal.3d 730, 734, (1981); Witkin, *California Procedure*, (3d Ed. 1985) Vol. 1, page 526.

Here, as in *Zauderer*, the public reproval imposed on Appellant exacts a potentially severe deprivation of liberty and property interests that are fully protected by the Due Process Clause. The reprimand brands Oring as an unethical attorney who has violated his oath of office, results in publication of the public reproval in the "California Lawyer", the official journal of the State Bar of California, and "may otherwise be made public" (Rules of Procedure of the State Bar, Rule 615). Moreover, one who has been previously disciplined is subject to greater discipline in the event of any subsequent offense, and, in the event the lawyer has suffered two prior impositions of discipline, he may be disbarred no matter how minor the nature of the offenses (Rules of Procedure of the State Bar, Standards for Attorney Sanctions for Professional Misconduct, Standards 1.7(a) and 1.7(b)).

It is quite clear that where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, due process rights must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

The presumption at issue in this case deprives an attorney of his due process rights. As in *Speiser v. Randall*, 357 U.S. 513 (1958):

> "The vice of the present procedure is that, where the particular speech falls close to the line separating the lawful and the unlawful, the possiblity of mistaken factfinding–inherent in all litigation–will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens . . . *How can a claimant . . . possibly sustain the burden of proving the negative of these complex factual elements?* In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. 'It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' " 357 U.S. at 562; emphasis added.

The *Speiser* reasoning applies with equal force here. Undoubtedly, California's presumption that testimonial advertising in misleading is an attempt to avoid these constitutional restrictions.

Since "[t]he threat of sanctions may deter the [exercise of freedoms] almost as potently as the actual application of sanctions" (*N.A.A.C.P. v. Button*, 371 U.S. 415 at 433 (1963)), the threat of discipline because of the existence of the presumption that any testimonial is false and misleading deters the exercise of First Amendment freedoms just as would an outright ban.[24]

Further, the presumption involved here violates due process considerations by ensuring that an attorney can be disciplined *even when the evidence indicates that it is as*

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[24] Under the California Rule in question here, the lawyer who utilizes testimonial advertising is forced to gamble and risk his license in the event that he fails to overcome the weight of the presumption that such advertising is misleading.

likely as not that his advertising is not misleading. Mullany v. Wilbur, 421 U.S. 684 at 703 (1975).

Having observed that attorney disciplinary proceedings are quasi-criminal in nature, the reasoning of *In re Winship,* 397 U.S. 358, 364 (1970) is persuasive:

> "It is . . . important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty . . . without convincing a proper factfinder of his guilt with utmost certainty."

Since the presumption at issue permits the State Bar to "convict" an attorney *in the absence of facts demonstrating that a testimonial advertisement is misleading,* it cannot withstand Constitutional scrutiny.[25]

Clearly, the shifting of the burden of proof to the attorney charged with a disciplinary offense cannot pass constitutional muster. Such a procedure is grossly unfair

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[25] Commentators have noted that it might be required that the advertiser be required to produce preliminary supporting evidence for his claim, but that this seemed a drastic step and one that may raise the type of constitutional issue discussed by Ira M. Millstein in his article entitled "The Federal Trade Commission and False Advertising", 64 *Columbia Law Review* 469 (1964) (See, Weston, *"Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor"* 64 *Federal Bar Journal* 562. Additionally, sustaining the burden of proving that a testimonial is not misleading would be difficult, if not impossible:

> "How to substantiate that a product's flavor 'comes through' or that it truly gives a 'natural color' or that only her hairdresser can tell whether 'she does or does not' may tax ingenuity." Austern, *What is "Unfair Advertising"? Food, Drug and Cosmetic Law Journal*-December, 1971, 659 at 661.

and deprives the attorney of the due process to which he is entitled.

III.

APPELLANT HAS NOT WAIVED ANY RIGHT TO URGE HIS CONSTITUTIONAL CHALLENGES NOW BEFORE THIS COURT.

The State Bar's claim that Appellant stipulated to the same degree of discipline that might ultimately be imposed on his then partner, David A. Grey, and that, therefore, he should not be able to independently make the constitutional challenges he has now made (Motion to Dismiss or Affirm, p. 13-14), simply fails to take into consideration the facts of this case.

The stipulation between the State Bar and Appellant specifically stated "the within stipulation as to recommended discipline is not binding upon the California Supreme Court." Jurisdictional Statement, Appendix "D," App. 10.

Thus, the stipulation itself provided that it was not binding upon the California Supreme Court, i.e., it was subject to independent review by that Court. In any event, a stipulation imports "no commitment to the recommended discipline" *Giovanazzi v. State Bar,* 28 Cal.3d 465, 471, 169 Cal.Rptr. 581 (1980). Thus, neither party can, by stipulation, waive their right to appeal State Bar Court decisions.

Even the letter imposing the public reproval sent by the State Bar to the Appellant, along with enclosures governing petitions for review by the Supreme Court of California, and signed by the "Presiding Referee," states:

"You may, if you so desire, seek Supreme Court review of the State Bar Court's action." (See Joint Appendix "D", J.A. 12.)

Since the stipulation entered into between the parties was merely a "recommended" stipulation and was not binding upon the California Supreme Court, it could not be binding upon this Court. The State Bar's contention is without merit, especially considering that in regards to fundamental rights, this Court has stated:

> "Indeed, in the civil no lesser than the criminal area, 'courts indulge every reasonable presumption against waiver.' " *Fuentes v. Shevin*, 407 U.S. 67 at 94, n. 31 (1972).[26]

IV.

CONCLUSION

The radio advertisement involved here was a statement by a client that a law firm had been concerned with her legal interests and had protected those interests fully. The advertisement is devoid of any hyperbole or any laudatory adjectives, any statements of the amount recovered, or any reference to any other attorneys. As such, the ad was neither deceptive nor misleading. The statements were admittedly true.

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[26] Even assuming, arguendo, that counsel's comments during the Hearing Department proceedings (at which Oring was not present (See, Transcript, Joint Appendix "B", J.A. 3-6.) could in some way be construed as an attempt to waive Oring's right to appeal, it is clear that under California law, counsel cannot waive appeal rights on behalf of his client. See, *Blanton v. Womancare, Inc.*, 38 Cal.3d 396 at 404-405 and n. 7, 212 Cal.Rptr. 151 (1985), *Linsk v. Linsk*, 70 Cal.2d 272, 276-277, 74 Cal.Rptr. 544 (1969).

The First Amendment commands that "restrictions upon . . . advertising may be no broader than reasonably necessary to prevent the deception." (*In re R.M.J.*, 455 U.S. 203). Since the presumption enacted by California is a very broad restriction, and since California did not attempt to restrict advertising by less onerous means such as the use of a disclaimer, explanation, or submission of the advertisement for prior review and approval as suggested by this Court (See *Bates, supra*, 433 U.S. at 375; *Shapero*), the presumption against testimonial advertising, and its application to the Appellant herein, cannot survive this Constitutional challenge.

Based on the foregoing, the judgment of the Supreme Court of California should be reversed.

DATED: August 22, 1988

Respectfully submitted,

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No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,
Appellant,

vs.

THE STATE BAR OF CALIFORNIA
Appellee.

On Appeal from a Judgment of
the Supreme Court of California

BRIEF OF APPELLEE

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QUESTIONS PRESENTED

1. Whether the California Rules of Professional Conduct regulating lawyer advertising are constitutionally valid in that they:

   a. encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices as to legal counsel;

   b. permit lawyers any and all forms of advertisement except that which is false, deceptive or coercive, or which fails to contain sufficient information to make the advertisement nondeceptive;

   c. provide for certain standards to inform lawyers as to what type of advertisements are presumed to be

misleading, deceptive or coercive; and

d. provide for the lawyer who runs an advertisement presumed misleading, deceptive or coercive under the standards an opportunity to demonstrate why the advertisement is not misleading, deceptive or coercive.

2. Whether California had reasonable grounds to adopt a standard that lawyer testimonial advertising is rebuttably presumed to be misleading or deceptive.

3. Whether the discipline imposed in this case is proper because the lawyer testimonial advertisement in question is ambiguous and misleading and not entitled to First Amendment protection whether or not the California Presumption is applied.

4. Whether Oring has a right to challenge the imposition of discipline

because of his stipulation which is binding upon him under California law.

5. Whether the high standards of honesty expected of lawyers generally should be lowered by holding that Oring has a constitutionally protected right to air an advertisement that is misleading and ambiguous and fails to provide any relevant hard factual information.

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No. 87-1224

In The
Supreme Court of the United States

October Term 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

BRIEF OF APPELLEE

I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Business and Professions Code Section 6076:

"Rules of Professional Conduct; Formulation

"With the approval of the Supreme Court the Board of Governors [of The State Bar of California] may formulate and enforce rules of professional conduct for all members of the bar in this State."

California Business and Professions Code Section 6077:

"Rules of Professional Conduct; Sanctions for Their Violation

"The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar.

"For a wilful breach of any of these rules, the board has power to discipline members of the State Bar by reproval, public or private, or to recommend to the

Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar."

Rules of Professional Conduct of The State Bar of California

Rule 2-101

"Professional Employment

"This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

"Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

"(A) A 'communication' is a message concerning the availability for professional employment of a member or a member's firm. A 'communication' made by or on behalf of a member shall not:

"(1) Contain any untrue statement; or

"(2) Contain any matter, or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse,

deceive or mislead the public; or

"(3) Omit to state any fact necessary to make the statements made, in light of the circumstances under which they are made, not misleading to the public; or

"(4) Fail to indicate clearly, expressly or by context, that it is a 'communication'; or

"(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

"(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

* * *

"(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what 'communications' will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in

disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. 'Presumption affecting the burden of proof' means that presumption defined in Evidence Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

Standard 2 adopted by the California State Bar Board of Governors pursuant to Rule 2-101(D):

"A 'communication' which contains testimonials about or endorsements of a member is presumed to violate Rule 2-101, Rules of Professional Conduct."

California Evidence Code

Section 115:

"§ 115. Burden of Proof Defined.

"'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the

evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

"Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

Section 605:

"§ 605. Purpose of Presumptions Affecting Burden of Proof.

"A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others."

Section 606:

"§ 606. Effect of Presumptions Affecting Burden of Proof.

"The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

California Business and Professions Code

Section 6025:

"Rules and Regulations; Determination as to Meetings and Quorum

"Subject to the laws of this State, the board may formulate and declare rules and regulations necessary or expedient for the carrying out [of the State Bar Act]. . . ."

Section 6086

"Procedure

"The Board of Governors, subject to the provisions of this chapter, may by rule provide the mode of procedure in all cases of complaints against members."

Rules of Procedure of The State Bar of California

Rule 401:

"RULE 401. STIPULATIONS AND ADMISSIONS DISPENSING WITH PROOF; POLICY: DUTY OF PARTIES TO CONFER

"Stipulations and admissions dispensing with proof or of facts not in dispute are encouraged. It is the duty of the examiner, whenever practicable, to confer prior to the formal hearing with the member's counsel or with the member, if not represented by

counsel, to endeavor to arrive at such stipulations or admissions. Such stipulations or admissions shall bind the parties, unless the hearing panel, for good cause, rejects, or relieves the parties from, such binding effect."

Rule 406:

"RULE 406. TERMINATION BY STIPULATION AS TO FACTS AND DISCIPLINE - CONTENTS OF AND APPROVAL BY PARTIES AND COUNSEL

"The proposed stipulation as to facts and discipline shall set forth each of the following:

"(i) stipulations as to proposed discipline are not binding upon the Supreme Court,

* * *

"The stipulation shall be approved by counsel of record for the member prior to approval by the member. Prior to approval by the examiner, the stipulation shall be approved by the chief trial counsel of the State Bar."

Rule 407:

"RULE 407. TERMINATION BY STIPULATION AS TO FACTS AND DISPOSITION--HEARING AND ACTION THEREON BY HEARING PANEL OR SETTLEMENT CONFERENCE REFEREE.

"(a) If the stipulation as to facts and disposition is entered into at the investigation stage, the review department shall review the stipulation as provided for in Rule 450(b).

"(b) If the stipulation as to facts and disposition is entered into at the formal hearing stage, the hearing panel or settlement conference referee shall examine into the facts or indicated facts, the fairness of the stipulation as to facts and as to disposition, and the effect of the stipulation upon the matters which are or may be client security fund matters or serious offenses. The hearing panel or settlement conference referee may order the approval of the proposed stipulation or its approval with modifications to the stipulation accepted by the parties. Thereafter, the review department shall review the order approving the stipulation as provided in Rule 450(b).

"(c) In cases of adoption of the stipulation by the review department, if suspension or disbarment is provided for, the stipulation, the order approving the stipulation, if required, the action of the review department and the formal record in any formal proceeding upon which discipline is based shall be filed with the Clerk of the Supreme Court. The record need not include a reporter's transcript unless required by the Supreme Court."

Rule 408:

"RULE 408. TERMINATION BY STIPULATION AS TO FACTS AND DISPOSITION--BINDING EFFECT: REJECTION OF.

"(a) Once adopted by the review department, a stipulation as to facts and disposition shall bind the parties in the proceeding or investigation. Once approved, the stipulation may not be withdrawn or modified without the written approval, upon good cause shown and notice duly given, of the referee or hearing panel having approved the stipulation or, of the presiding referee. Any request for a withdrawal or modification of the stipulation must be served

and filed within fifteen (15) days of service of the order approving the stipulation."

II

STATEMENT OF FACTS

A. The Nature of The State Bar of California.

The State Bar of California ("State Bar") is a public corporation. It is established as a constitutional agency under the judicial branch of government. All persons licensed to practice law in California are members of the State Bar. Cal. Const., art. VI, § 9. All property of the State Bar is held for essential public and governmental purposes in the judicial branch of government, and all income therefrom is exempt from taxation. Cal. Bus. & Prof. Code, §§ 6008, 6008.2.

The State Bar was initially integrated in 1927 pursuant to statute. Cal. Stats.

1977, ch. 34. See Cal. Bus. & Prof. Code, §§ 6000-6206.

All State Bar functions are public as established by California law. Constitutional, statutory, rule and decisional duties fall into several categories, among which the principal ones are:

1. The State Bar, in the exercise of its constitutional duties, appoints four members of the Judicial Council and two members of the Commission on Judicial Performance. Cal. Const., art. VI, §§ 6, 8.

2. The State Bar is the administrative arm of the Supreme Court of California. Brotsky v. State Bar, 57 Cal.2d 287, 300 (1962). The State Bar is charged with the administration, implementation and enforcement of legislative and Supreme Court standards governing admission to practice law, e.g., Cal. Bus. & Prof. Code, §§ 6046,

6060-6066; Cal. Rules of Court, rule 957; In re Admission to Practice Law, 1 Cal.2d 61 (1934), and the discipline of persons admitted to practice and those who would seek readmission after disbarment or resignation, e.g., Cal. Bus. & Prof. Code, §§ 6075-6086.6; Cal. Rules of Court, rules 951-952; Jacobs v. State Bar, 20 Cal.3d 191 (1977); In re Walker, 32 Cal.2d 488 (1948). The State Bar must administer, implement and enforce programs ordered by the California Supreme Court concerning specialization, Bar Misc. 4681, and practical training of law students, Bar Misc. No. 4089.

3. The State Bar is charged with enforcing the state law relating to unlawful practice of law and unlawful solicitation of professional employment. Cal. Bus. & Prof. Ccde, §§ 6030, 6125-6131, 6150-6154.

4. The State Bar is charged with the administration, implementation and enforcement of state law governing law corporations. Cal. Bus. & Prof. Code, §§ 6160-6172; Cal. Corp. Code, § 10830; pt. IV, div. 3, tit. I of Cal. Corp. Code (§ 13400 et seq.).

5. The State Bar is required to assist the California Law Revision Commission, Cal. Gov. Code, § 10307, and it aids in all matters pertaining to the advancement of science of jurisprudence and to the improvement of justice in California. Cal. Bus. & Prof. Code, § 6031.

6. The State Bar or a designated agency of the State Bar is required to evaluate the judicial qualifications of all potential appointees and nominees for judicial office who are nominated by the Governor of California pursuant to subdivision (d) of section 16 of article VI

of the California Constitution. Stats. 1979, ch. 534, § 2 (adding Cal. Gov. Code, § 12011.5). The State Bar is also required to establish and promulgate rules and procedures regarding the investigation of the qualifications of candidates for judicial office. Stats. 1979, ch. 534, § 2(e).

7. The State Bar is required to establish, maintain and administer a system and procedure for the arbitration of disputes concerning fees charged for professional services by members of the State Bar or by members of the bar of other jurisdictions. Cal. Bus. & Prof. Code, §§ 6200-6206.

In relation to the discipline of lawyers, the State Bar has the authority to conduct investigations (Cal. Bus. & Prof. Code, §§ 6040-6045); to establish disciplinary boards (the State Bar Court) to

act in matters relating to the discipline and reinstatement of lawyers (Bus. & Prof. Code, § 6086.5); to adopt rules of procedure (Bus. & Prof. Code, §§ 6025, 6086); with the approval of the Supreme Court, to adopt rules of professional conduct that are binding on members of the State Bar (Bus. & Prof. Code, §§ 6076, 6077); and, subject to petition for review by the Supreme Court, to impose public or private reprovals on members of the State Bar or to recommend their disbarment or suspension from the practice of law (Bus. & Prof. Code, § 6078).

B. The Facts of this Case.

This is an appeal from a denial by the Supreme Court of California of a petition for review by appellant, Mark Oring ("Oring"), of the action of the Review Department of the State Bar Court of The State Bar of California of June 2, 1987 in

In the Matter of Mark H. Oring

(84-0-131 LA). That action was:

> "RESOLVED that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted." (Appendix A, Jurisdictional Statement, App. 1.)

Oring had previously stipulated to accept the discipline imposed upon David Grey ("Grey"), Oring's law partner. Appendix D, Jurisdictional Statement (App. 8) and appendix E, Jurisdictional Statement (App. 12); Brief of Appellant ("Br. App."), pp. 8, 45. Grey had received a public reproval (a comparatively mild form of discipline; only a private reproval is less severe) for the identical radio advertisement for professional employment that is at issue in the instant proceeding (Grey v. State Bar of California,

U.S. S.Ct. No. 86-791), cert. denied Jan. 12, 1987).

The facts of this case are not in dispute and indeed are stipulated. Appendix D, Jurisdictional Statement. In or about 1982, Oring and his then partner, Grey (lawyers), engaged in a radio advertising program concerning their availability for professional employment. One such radio "spot" consisted of a former client speaking as follows:

> "I was rear ended on the San Diego Freeway and all my medical bills were piling up and the insurance company was giving me a hard time, constantly harassing me, just all in all gave me a bad time. I contacted an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey and Oring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey and Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance

> company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I would definitely go back to Grey and Oring. I certainly do believe that."[1]

This message was followed by an announcer stating,

> "Grey and Oring. That's G-r-e-y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey and Oring. 558-8000. There's no charge for consultation. 558-8000."

Appendix D, Jurisdictional Statement, App. 9.

Thereafter a State Bar investigation ensued and on April 24, 1984, a Notice to

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[1] Counsel for the State Bar cannot be certain from the information of the advertisement whether Sharon S.'s bad faith insurance claim was a first party claim against her own insurer, or a third party action against her opponent's insurer. Because Oring cites Egan v. Mut. of Omaha Ins. Co., 24 Cal.3d 809, 157 Cal.Rptr. 482 (1979), rather than Royal Globe Ins. Co. v. Superior Court, 23 Cal.3d 880, 153 Cal.Rptr. 482 (1979), it is assumed that Sharon S.'s claim was against her own insurance company.

Show Cause[2] was issued against Grey and Oring, charging the dissemination of a communication concerning their availability for professional employment which was false, deceptive or which tended to confuse, deceive or mislead the public and which omitted to state all facts necessary in order to make the statements contained in the advertisement not misleading to the public, in violation of rule 2-101, Rules of Professional Conduct.

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2 On January 11, 1983 an investigation referee had declined to issue a Notice to Show Cause on the ground that rule 2-101(D) was unconstitutional and that there was no evidence by the State Bar that suggested the advertisement was misleading. Joint Appendix, appendix A, p. 1. However, upon request of the State Bar Examiner, further proceedings were ordered (pursuant to rule 512 of the Rules of Procedure of the State Bar as they then existed). Thereafter, a different investigation referee considered the matter and a Notice to Show Cause was issued. Oring has not contended that this procedure in any way violated his rights.

Thereafter, on December 5, 1984, Oring and the State Bar entered into a Stipulation as to Facts and Disposition. Oring and the State Bar stipulated that the advertisement was caused to be broadcast by Grey and Oring; the statements made by Sharon S. were extemporaneous and true and were not discussed with either Grey or Oring when recorded, nor were Grey, Oring or any member of their office present when the radio spot was recorded, and at the time Oring engaged in the advertising program he was aware of rule 2-101 and, in particular, Presumption (2), adopted pursuant to rule 2-101(D), which states "(2) a 'communication' which contains testimonial about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct." Rule 2-101(D), Standard (Presumption) 2.

On the same date, Oring and his counsel entered into a document entitled "Stipulation Re: Filing and Force or Effect of 'Stipulation as to Facts and Disposition'" which provided:

> "that said Stipulation [Jurisdiction Statement Appendix D] shall be of no force or effect unless and until a final disciplinary Order is made and entered as against Respondent DAVID A. GREY. Any order so made as to DAVID A. GREY shall not be deemed 'final' unless and until all appeals, petitions for hearing, petitions for certiorari, etc. have been exhausted at all State and Federal levels should GREY seek such relief.
>
> "In the event GREY should be exonerated or . . . otherwise discharged without the imposition of any discipline, the Stipulation [Appendix D, Jurisdictional Statement] shall be of no force or effect . . . it being the intention of the parties and counsel herein that ORING shall not be subject to any greater degree of discipline at any time as [sic] the degree of discipline ultimately imposed upon GREY. (Appendix E, Jurisdictional Statement, App. 12-13.)"

The intent of Oring in entering into the stipulations was that "whatever happens to Mr. Grey would happen to Mr. Oring." Appendix A, Joint Appendix, p. 5. See also, Br. App., p. 8, "The parties agreed to a punishment consisting of a public reproval, subject to the second stipulation below," i.e., to the stipulation set forth in appendix E, Jurisdictional Statement, App. 12-13.

The Hearing Panel approved the stipulation[3] but declined to find culpability because it found rule 2-101 unconstitutional. The Hearing Panel stated it "need not and does not make a determination of whether the advertisement here involved is or is not misleading."

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[3] No motion to modify either stipulation was ever made by Oring. See rule 408, Rules of Procedure. In 1987, after the Grey matter was final, the Review Department approved the stipulation as to Oring. See, infra, p. 26.)

Appendix B, Jurisdictional Statement, App. 6.

On October 23, 1985, the Review Department of the State Bar Court in the matter of David A. Grey adopted the findings of fact stipulated to by Oring and the State Bar but made no mention of approving the stipulation. The Review Department found:

> "7. The above quoted presumption adopted pursuant to Rule 2-101(D), Rules of Procedure of the State Bar, is constitutional as applied to Respondent, David A. Grey. Respondent failed to present evidence sufficient to rebut said presumption."[4]

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[4] Grey was apparently more interested in attacking the constitutionality of the rule than in proving the advertisement was not misleading. The following colloquy took place at the Hearing Panel argument:

> "Referee Kellner: . . . We could find this was a testimonial - in a narrow opinion - that it's not misleading, and that's the end of this case. . . .
>
> "Mr. Ruben: [Counsel for Grey] . . . [T]hat this is not misleading even with the
>
> (continued...)

The Review Department "[f]urther resolved that Respondent David A. Grey is hereby publicly reproved." Appendix F, Jurisdictional Statement, App. 15-17.)

By order dated July 15, 1986, the Supreme Court of California denied Grey's petition to review the State Bar Review Department's imposition of public reproval. David Ashburn Grey v. State Bar, No. L.A. 32152, Cal. S.Ct. No. S002271. On October 31, 1986, Grey filed a petition for writ of certiorari with this Court. David Ashburn Grey v. State Bar of California, U.S. S.Ct. No. 86-791. On January 12, 1987, this Court denied Grey's petition for writ of certiorari. ____ U.S.____, 107 S.Ct. 885, ___ L.Ed.2d ___ (1987). On April 16,

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[4](...continued)
> presumption is really the one result we didn't want. . . . (R.T. Dec. 5, 1984, 24:4-14.)"

1987, the State Bar Review Department denied Grey's request for stay and reconsideration.

Following Grey's exhaustion of all avenues of appeal, the imposition of discipline imposed on October 23, 1985 became final.

On June 2, 1987, the Review Department approved the stipulation entered into by Oring and the State Bar and imposed on Oring a public reproval, the identical discipline imposed on Grey. Appendix A, Jurisdictional Statement, App. 1-3.

Oring then petitioned the California Supreme Court for a writ of review. On October 28, 1987, the California Supreme Court denied review, thereby preserving the discipline imposed by the Review Department. Appendix C, Jurisdictional Statement. On January 7, 1988, Oring appealed to this Court from the final judgment of the California Supreme Court. Appendix G,

Jurisdictional Statement. On June 30, 1988, this Court noted probable jurisdiction.

III

SUMMARY OF ARGUMENT

Oring's constitutional challenge to the California judgment imposing a public reproval on him for airing a testimonial advertisement on the radio fails to take into account that the First Amendment protection heretofore accorded to commercial speech does not embrace misleading and deceptive communications. Also, it fails to address the fact that the adoption of the presumption triggering disciplinary proceedings herein is a valid exercise of the State's power and authority to protect the members of the public who consume legal services.

Moreover, Oring does not recognize that whether the presumption is applied or not, Oring's advertisement is not shielded by the

First Amendment because it is misleading in that it is ambiguous, omits material facts, appeals to the emotional rather than rational side of the intended listener, and constitutes nothing more than a testimonial as to quality. As a result, his testimonial advertisement falls far outside the ambit of the type of commercial advertising which was assumed to lead to the "informed and reliable decision making" contemplated in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1976).

California's regulations for lawyer advertising are no more extensive than necessary to protect its citizens and are narrowly drawn. The regulations permit all forms of advertising, including advertisement by radio and television, so long as the advertisement is true, and is neither misleading nor coercive. The

Preamble to the California Advertising Rules states that the purpose of the Rules is

> "To foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choice of legal counsel." Rule 2-101, Rules of Professional Conduct.

The California restrictions comply with the test set forth in Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). California has a substantial state interest in restricting misleading commercial speech, and testimonials in general are misleading. They focus the consumer on the wrong information, i.e., the emotional identification with the endorser, rather than upon factual information. Testimonials generally do not contribute to informed and reliable decisionmaking in choosing a lawyer. Moreover, they are rife with possibilities for abuse. For example,

advertisers could provide the testimonial of the one client for whom they obtained an acquittal and ignore the many others who languish in jail because of inadequate representation. The appeal of testimonials is based on the source of the information rather than the information provided. Testimonial advertising readily lends itself to omission and misrepresentation, as is recognized by Federal Trade Commission regulations.

California regulations are no more extensive than required to serve its interests. In order to assist members of the Bar to know in advance what kinds of advertisement might prove deceptive, misleading or coercive, the State Bar rules provide for the adoption of standards that do not forbid all testimonial advertising, but merely shift to the lawyer who advertises the burden of demonstrating that

an advertisement is not untruthful or deceptive. Thus, a lawyer such as Oring, who advertises with a testimonial, must, if challenged, come forward with a showing by a preponderance of the evidence as to why the testimonial is not misleading. A valid testimonial is itself such evidence and can usually pass muster by providing more, not less, information.

The California presumption rule meets the constitutional test of inferential relationship between the basic fact and the presumed fact. The testimonial presumption is reasonable and not arbitrary, and it provides minimum interference with lawyer advertising.

However, with or without the presumption, Oring's testimonial advertising is misleading, although every word in it is stipulated to be true. It is misleading because it omits to state facts necessary to

discern that the double recovery by the client was because of insurance company bad faith and that, although many people are unhappy with insurance companies, very few will have a cause of action for bad faith. The testimonial is misleading because it portrays a highly successful result based upon the opinion of a happy client who in actuality has no ability to assess whether the result was good or bad. The testimonial is misleading because it portrays the litigation process as simple, easy and sudden. In addition, the ad contains little hard, factual information and is fundamentally a representation of quality which, according to this Court, cannot be measured and may be so likely to be misleading as to warrant restriction. Bates, 433 U.S. at 383, 384.

Moreover, Oring's effort to overturn the decision of the California Supreme Court

is flawed insofar as he fails to show any reason why the stipulation as to facts and discipline that he agreed to is not binding upon him. At no point during the disciplinary proceedings did he ever cast doubt on its binding effect. No greater discipline was imposed than was specified in the stipulation. Under California law, the stipulation is final. Innis v. State Bar of California, 20 Cal.3d 552, 558 (1978).

Public policy also supports the upholding of the California Supreme Court judgment. Pursuant to statute, rules of professional conduct and long-standing tradition, lawyers are held to a higher standard of ethics and honesty than most other professions and trades. When lawyers enter the commercial advertising arena, that higher standard is not, and should not, be diminished. The duties placed on California attorneys to be truthful to prospective and

potential clients are of no less importance than those which must be accorded current clients, the court, and other parties to litigation. Granting the relief that Oring seeks would seriously undermine the commitment that lawyers undertake--to deal in utmost good faith and candor.

IV

ARGUMENT

A. THE ADVERTISEMENT AS A WHOLE IS A TESTIMONIAL AS TO QUALITY AND NOT PROTECTED BY THE FIRST AMENDMENT

1. Oring's Testimonial Advertisement Is a Representation of Quality and Is Misleading

The Sharon S. advertisement used by Grey and Oring to promote their legal services to the public was a cleverly constructed testimonial by a former client who had been injured in an auto accident. Sharon S. recounts how Grey and Oring immediately took her case, helped her get a "nice award" at trial and then, unexpectedly

and suddenly, procured for her a double recovery from an insurer.

Sharon S.'s testimonial includes the assertion that "[i]f I had any legal problem, car accident or anything, I'd definitely go back to Grey and Oring. I certainly do believe that." Taken together with the image of a case instantly taken up by Grey and Oring, effortlessly leading to a sudden, double recovery and the overall tenor of the testimonial, these statements comprise a representation of quality and, as such, are misleading.[5]

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5 Oring suggest that Sharon S.'s statements were to be taken as mere "puffing." However, when "puffing" includes such specific "facts" as "two times the amount of the original trial" without further explanation, it crosses the boundaries of harmlessness. "Puffing that misstates material facts is not protected speech." S. Makar, Advertising Legal Services, 37 Univ. Florida L. Rev. 969 (1985). "The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right." Zauderer v. Office of

(continued...)

"Advertising claims as to the quality of services . . . are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." Bates, supra, 433 U.S. at 383-384. Applicant's advertisement is misleading in that it is, both by specific content and by virtue of its nature, a representation of quality.

"In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates, supra, 433 U.S. at 383-384. Oring's advertisement, while true in a technical sense, is misleading. It

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[5](...continued)
Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 652, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).

does not tell all that should be told, most importantly, that the sudden "double recovery" resulted from a second cause of action (in addition to the auto accident personal injury action): an insurance bad faith claim, a rarely available cause of action. As such, it is impermissible in legal advertising.[6]

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6 Oring argues that the testimonial in question is analogous to the accurate drawing of the Dalkon Shield in Zauderer. 471 U.S. at 647. Br. App., pp. 12-13. In that case, the "accurate representation [had] no features that are likely to deceive, mislead, or confuse the reader." Id. at 647. Rather, it presented a clear and objectively verifiable picture of a medical apparatus, which had caused injury to a large number of women and was the subject of thousands of actions.

Unlike the subjective testimonial in the instant case, the illustration of the Dalkon Shield made no claims as to the quality of attorney Zauderer's legal services. The court observed, "[i]ndeed, because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations . . . will probably be less likely to lend

(continued...)

First Amendment protection is not accorded to lawyer advertising which is misleading. See Zauderer, supra, 471 U.S. at 638. If experience has shown a particular form of advertising to be misleading, even though that form of advertising may not at first seem to be, on its face, inherently misleading, the state may impose reasonable restrictions. In re R.M.J., 455 U.S. 191, 202, n. 11, 102 S.Ct. 929, 936, n. 11, 71 L.Ed.2d 64 (1982). Testimonial advertising, as demonstrated by Oring's advertisement, constitutes such a case.

> "[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven in fact such advertising is subject

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[6](...continued)
themselves to material misrepresentation." Id. at 649. The use of a simple printed illustration in an advertisement is clearly distinguishable from the use of language (testimonials) that can mean many things to different people.

> to abuse, the states may impose appropriate restrictions." In re R.M.J., 455 U.S. 191 at 203.

One commentator has put it this way:

> "As early as 1929 the courts recognized that testimonials have a stronger appeal to members of the purchasing public than other types of advertising. For this reason such statements may be more, not less, obnoxious to the law." E. Kinter, A Primer on the Law of Deceptive Practices (Macmillan 2d.ed. 1978) p. 151.

In summary, testimonials contain statements of personal experience which have little use beyond speaker-identified representation of quality. Because no hard facts which are capable of valuation and measurement are presented, the testimonial's worth rests on the credibility of the speaker. This is an emoticnal, rather than rational, appeal.[7] Moreover, their limited-

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[7] The radio spot advertisement at issue in this proceeding is particularly devoid of any hard information. Indeed, it is difficult for even lawyers to tell from the advertisement what really occurred, let
(continued...)

length format accentuates the danger of omission. For these reasons, testimonials are inherently misleading absent some "clear and conspicuous" caveat or adequate information that is contained in the advertisement.

The possibilities for deception in testimonial advertising are numerous. The acclaiming client may be an attorney's single satisfied customer among many others who feel ill-served. A description by an unsuspecting client of a settlement quickly reached may in fact reflect a claim compromised for far less than its actual value. One acquittal endorsed by the client at liberty may, if it be known, be compared to a far more representative string of guilty verdicts. The celebrity of the

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[7](...continued)
alone the illiterate and functionally illiterate listeners to whom the advertisement is apparently directed. Br. App., p. 13.

endorser may far overshadow any actual informational value useful in making an informed and reliable decision that might be presented in the ad.

2. Congress and the Federal Trade Commission Have Recognized that Testimonial Advertising Requires Certain Restrictions.

The Federal Trade Commission Act defines "false advertisement" as follows:

> "The term false advertisement means an advertisement, other than labeling, which is misleading in a material respect, and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or any combination, therefor, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material, with respect to consequences which may result from the use of the commodity to which the advertisement relates, under the conditions prescribed in said advertisement or under such conditions as are customary or usual." (Emp. added.) 15 U.S.C. § 55(a)(1).

The Federal Trade Commission rules provide, in relation to testimonial and endorsement advertising, as follows:

> "Endorsements must always reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, they may not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser." (Emp. added. 16 C.F.R. 255.1.)

Federal Trade Regulations are specific as to:

> "Consumer endorsements.
>
> "(a) An advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for his representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve . . . ." (Emp. added, ibid. 255.2.)

Pursuant to the Federal Trade Commission rule 255.2, Oring's advertisement is deceptive. It omits material information regarding what happened to Sharon S. while not disclosing, much less "disclos[ing] conspicuously," the limited transferability of the experience of Sharon S. to other potential clients.

Further insight into devising and applying appropriate standards in this area is provided as follows:

> "A key concept in deceptive advertising analysis is that omitted information may render an advertisement deceptive. [Citation] This concept is particularly important in the context of advertising statements regarding profitability associated with using the product or service." (Emp. added.) A. A. Caffey & D. J. Kaufman, The Laws of Advertising in Franchising, 412 PLI/Comm 689, 702 (1987).

Authors Caffey and Kaufman continue,

> "The Basic Rules Do Not Change for Testimonials and Endorsements. In general, the same standards apply to testimonial statements as to any other advertising claim. The mere fact that it may have been said by an actual customer does not relieve . . . an advertiser of its responsibility to remove misleading or deceptive statements from its materials . . . . The endorsement itself must not be misleading in the context in which it is used, and may not carry with it deceptive implications as it is presented in the advertisement." Id. at 703-704.

> "Simply stated, false advertising is (1) materially misleading under the circumstances (2) either through statements made or information omitted. This is the standard . . . by which any advertiser's promotional material must be measured." Id. at 697.

Clearly, Oring's advertisement, when measured against these standards, is misleading. Not only does it provide unclear information as to what really happened to Sharon S., as well as grossly

oversimplify the nature of the legal system, but it also omits any reference to insurance bad faith, the real cause of action on which the second "double" recovery was based, and a cause of action that is essentially unavailable to most of the radio-listening public.

3. Oring's Contentions Are Without Merit

Oring contends that "the evidence . . . demonstrates that testimonials depicting a practitioner's attributes are not misleading or deceptive and do not significantly affect purchase probabilities." Br. App., pp. 23/24. Oring cites Murdock and Linenberger, Legal Advertising and Solicitation, 16 Land and Water Law Review, 627, as the source of "the evidence." The passage from which Oring's "evidence" comes, states:

> "Paternalistic judgments of the consumer's ability to evaluate subjective information are

unnecessary. In fact, an experiment involving legal advertising found that practitioner attributes (functional quality, and descriptive) and fee level information (above, at, and below market level) had no significant effects on the purchase probabilities or attitudes of respondents. Instead, the respondent's purchase probabilities and attitudes were significantly affected by the source of the information: direct mail, direct mail plus a friend's recommendation, and a professional referral. Purchase probabilities and positive attitudes increased with the number of sources and as the sources changed from impersonal to personal." (Emp. added.) Id. at 677-678.

Although this "evidence," when set forth without omission, has no direct bearing on testimonial advertising, it is entirely compatible with the proposition that the content of a testimonial is judged by consumer identification with its source.

Moreover, although the entire quoted passage, in context, contains no suggestion that "[c]onversely, the source of the

information, e.g., the fact that the attorney represents IBM" is said to significantly affect purchase possibilities (Br. App., p. 24), Murdock and Linenberger do argue that listing the names of clients regularly represented should be equated to allowing those same clients to express their opinions on quality of service. Id. at 677. If there is any merit to this argument, which we do not here concede, it cannot be stretched to cover the Sharon S. testimonial for the following reasons.

Large public corporations have a responsibility to their shareholders, employees and the markets in which they transact their business. Their decisions involve millions of dollars and have extremely widespread effect. Thus, any decision on behalf of IBM is subject to rigorous real-world accountability. We submit there is an enormous difference

between the implications of IBM's decision to employ a particular law firm and Sharon S.'s personal injury and bad faith lawsuits. Any basis for expertise, or even full understanding of the nature of her legal claims, cannot be assumed or shown for Sharon S.

The danger and power of testimonials is that, by their very nature, they deflect attention from the content of the message to the speaker. Testimonials are in fact distinguishable from other forms of advertising by this unique screening quality: the speaker is assessed first, and any information provided is judged upon the emotional identification the hearer feels toward the speaker. Testimonials, as we have said, rather than inviting objective

questioning of content, demand judgment of the speaker's credibility.[8]

Advertising containing little or no hard factual information, appealing to the emotions of the illiterate or functionally

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[8] Oring contends that testimonial advertising is the "20th century equivalent of the traditional method of obtaining clients based on reputation in the community, citing Bates, supra, 433 U.S. at 374, n. 30. This assertion misses the point made by the court at note 30. Recognizing that "[a]lthough the [referral system relying on reputation in attorney selection] may have worked . . . [in the] small, homogeneous communit[ies of the past], commentators have seriously questioned its current efficacy," the court went on to state that because the typical practice of law has long since been removed from its small town setting, information as to the qualification of lawyers was not available to many and, where available, may be inaccurate or biased. (Id.) We submit the testimonial in this case did not supply much real information.

If anything, testimonials, tied as they are to the credibility of and identification with the speaker, lack the very factors which make reputational systems of referral efficient: a community so small that clients could either know the lawyer or the person recommending the lawyer personally or could otherwise check the credibility of the information provided.

illiterate populace as this one does (Br. App., p. 13), does not serve the "individual and societal interests in assuring informed and reliable decisionmaking," that the Court had in mind when lawyer advertising was accorded First Amendment protection. Bates, supra, 433 U.S. at 364. Nor does it provide the "free flow of commercial information" that was lauded as "indispensable" by the Court in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). See also 425 U.S. at 761-765.

Oring also states "[c]ommentators have concluded that testimonials 'greatly help consumers,'" citing Moss, The Ethics of Law Practice Marketing, 61 Notre Dame L. Rev. 601, 621. Br. App., p. 22. Moss is in fact citing to Murdock and Linenberger, supra, at 676-677, and makes basically the same

arguments as Murdock and Linenberger about listing regularly represented clients. The Murdock and Linenberger comments which may have led Moss, et al. to view testimonials as "greatly help[ing] consumers" are essentially an incarnation of the testimonials-as-modern-day-word-of-mouth argument refuted, supra, at n. 8, p. 49, and by this Court in Bates. Sharon S. is not IBM.

Common sense, as well as experience, demonstrates that testimonial advertising is rife with the possibility of deceiving members of the consuming public and that, without some regulation, testimonial advertising by lawyers can lead to serious abuses.

4. Because Testimonial Lawyer Advertising Is Subject to Abuse, the State Has a Substantial Interest in Imposing Reasonable Restrictions on Such Advertising.

California has a substantial interest in protecting its citizens and consumers of legal services from the dangers of deceptive and misleading lawyer advertising. California has done this with rules regarding attorney advertising designed to encourage more, rather than less, information; it has not, however, attempted to prevent attorneys from conveying information to the public. Zauderer, supra, 471 U.S. at 650. The only advertisements subject to prohibition are those which are false, misleading or deceptive, in addition to solicitation which is coercive or conducted by cappers, runners and the like.

Rule 2-101, Cal. Rules of Professional Responsibility.[9]

Contrary to the impression Oring attempts to create, testimonials are, in fact, not prohibited in California. Rather, as discussed below, testimonials are only presumed to be in violation of rule 2-101, and that presumption is rebuttable.

The test for determining whether California regulation of commercial attorney advertising is necessary is contained in Central Hudson Gas & Electric Corp. v.

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9 Three other standards presumed to violate rule 2-101 are not at issue in this case. They involve "'communication[s] which contain guarantees, warrantees or predictions [or are] delivered in person or by telephone to a potential client . . . in such physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment . . . [or] transmitted at the scene of an accident or at or en route to a hospital, emergency care center or other health care facility . . . ." Rule 2-201(D), Rules of Professional Conduct, Standards 1, 3, 4.

Public Service Commission, supra, 447 U.S. at 566.

> "At the outset, we must determine (1) whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. (2) Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest." Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n., supra, 447 U.S. at 566.

a. California Has a Substantial Interest in Protecting Consumers of Legal Advertising from Misleading Advertisements.

In Central Hudson, the Court took the position that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." Central Hudson, supra,

447 U.S. at 563. The limited knowledge of the public, the legal profession's finite capacity to police itself, and the absence of standardization in attorney services combine to produce an advertising situation particularly prone to confusion and abuse. California has a legitimate interest in controlling such potential abuse. In re R.M.J., supra, 455 U.S. at 203.

Although in little more than a decade of professional advertising decisions, many of the justifications traditionally mustered to ban attorney advertising have fallen, these rulings do not diminish the substance of still tenable state interests. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 460, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

Among these continuing interests are: ensuring that advertising itself is not misleading, Virginia Pharmacy, supra,

425 U.S. at 771-772; Zauderer, supra, 471 U.S. at 658, n. 2 (Brennan concurring and dissenting); "requiring that lawyers consistently exercise independent professional judgment on behalf of their clients" (Zauderer, supra, 471 U.S. at 678 (O'Connor dissenting); and encouraging the "free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel." Preamble, rule 2-101, Rules of Professional Conduct.

The State Bar's concern with the dangers of testimonials or endorsements which contain implicit representations of quality was neither hypothetical nor speculative when Standard 2-101(D)(2) was adopted by the Board of Governors. Experience and common sense demonstrate daily the pitfalls of such advertising. See

Friedman v. Rogers, 440 U.S. 1, 13, 99 S.Ct. 887, 896, 59 L.Ed.2d 100 (1979); see also Posades de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986).

b. California's Presumptions Directly Advance Those Substantial State Interests.

California's restriction on testimonials and endorsements have a substantial connection to a valid state interest, unlike most of the other state regulations regarding professional advertising examined by this Court. Compare Virginia Pharmacy, supra, 425 U.S. 748 (advertising of price of standardized prescription drugs banned to protect ethical and professional standards); Bates, supra, 433 U.S. 350 (advertising of price of "routine" legal services restrained in order to deter shoddy lawyering); In re R.M.J., supra, 455 U.S. 191 (prohibition of certain

listings struck down for failure to demonstrate nexus between substantial state interest and the forbidden listings); Zauderer, supra, 471 U.S. 626 (State concerns regarding dangers of stirring up litigation and difficulty of administration insufficiently connected to support a prohibition of "legal advice" and illustrations in lawyer advertising); Shapero, supra, ___ U.S. ___, 108 S.Ct. 1916, 56 L.W. 4532 (June 1988) (interest in preventing potential for abuse inherent in direct solicitation inadequately related to sustain interdiction of targeted direct mail advertising to persons known to have particular legal needs). Cf. Ohralik, supra, 436 U.S. 447 (ban of in-person solicitation upheld as directly advancing state interest of preventing coercive solicitation by trained advocates).

California's Presumption 2 is directly aimed at the problem of lawyer advertising by endorsement or testimonial, i.e., advertising that provides no hard factual information about legal services but instead deceives and misleads legal service consumers.

c. The Presumption Device of Rule 2-101(D) Is No More Extensive than Necessary to Advance California's Substantial Interest.

The final prong of the Central Hudson analysis asks whether the regulation is more extensive than is necessary to serve the state interest being advanced. Central Hudson, supra, 447 U.S. at 566.

> "[T]he states may not place an absolute prohibition on certain types of potentially misleading information [e.g. testimonials] . . . if the information also may be presented in a way that is not deceptive. In re R.M.J., supra, 455 U.S. at 203.

The presumption instrument of rule 2-101(D) in fact demands that, with testimonials, enough information be presented to prevent its being deceptive. In order to advertise with a testimonial, an advertisement need only comply with the requirements of rule 2-101(2) and (3), i.e., that the advertisement neither contain, omit, nor present material in a manner which would tend to confuse, deceive or mislead the public, in order to escape the operation of the presumption of 2-101(D), Standard (2). Thus, the California interest which is directly advanced by the regulation concerning testimonials and endorsements is the permissible restriction of misleading advertisement. Ohralik, supra, 436 U.S. at 464-465.

The formulation of the California Rules of Professional Conduct relating to lawyer advertising, prior to their presentation in

1978 to the California Supreme Court, took place over a substantial period of time, both before and after Bates. Once this Court decided Bates, The State Bar of California recognized that lawyer advertising was a fact of life, and every effort was made to structure rules that permitted the free flow of truthful and responsible information through advertising. Thus, the only restrictions on lawyer advertising are that it be truthful, nondeceptive, nonmisleading and noncoercive. None of the advertising cases that arose in Missouri (R.M.J.), Ohio (Zauderer), or Kentucky (Shapero) would have occurred in California. Through the Standards adopted by the State Bar, only those special and limited forms of advertising that the State Bar believed to be deceptive or misleading (i.e., warranties, guarantees, testimonials and endorsements) or coercive (personal or

telephonic solicitation of persons who, because of physical or emotional state, are unable to exercise reasonable judgment, or solicitation at the scene of an accident) were delineated. The Bar also sought to provide members with a readily available standard. Moreover, as rule 2-101(D) was enacted to provide some flexibility as the laws of lawyer advertising developed, the State Bar retains authority to adopt additional standards. However, in the ten years that the California rules have been in force, no further standards have been formulated.

Oring ignores the fact that subsection D does not absolutely prohibit any advertisement--it only establishes a presumption that certain types of advertisement violate rule 2-101. If the advertisement is indeed truthful, free of deception and is not harassing, it is a

simple matter for the advertising lawyer to so demonstrate.

California's limited restrictions on attorney advertising are based on the belief that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." Virginia Pharmacy, supra, 425 U.S. at 770, 96 S.Ct. at 1829. The advertisement in question is misleading because it contains too little, rather than too much, information. It constitutes a half-truth and is not free from deception.[10]

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[10] Oring raises the stipulated fact that Sharon S.'s comment were "extemporaneous" as a virtue. Br. App., p. 24. We suggest that Oring, aware of the true circumstances of Sharon S.'s two causes of action and the requirements of rule 2-101 "and in particular, of presumption (2), adopted pursuant to rule 2-101(D) . . ." (appendix D, Jurisdictional Statement, App. 9-10), should have advised her or the

(continued...)

Oring's position contrasts with the view of this Court expressed in Zauderer:

> "Appellant overlooks material differences between disclosure requirements and outright prohibitions on speech. [Ohio] has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." Zauderer, supra, 471 U.S. at 650.[11]

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[10](...continued)
ad agency of the few facts which she needed to state in order to prevent the testimonial from being misleading. We submit this virtue of full disclosure should have taken precedence over the extemporaneous nature of the attorney advertising. Also, although the record reflects that Sharon S.'s "statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded," it does not indicate whether the text that was aired was the whole of Sharon S.'s statement. If only selected portions were broadcast, then Oring declined a second opportunity to ensure that the advertisement was not, by omission, misleading.

[11] See also Bates, supra, 433 U.S. at 384 ("We do not foreclose the possibility that some limited supplementation . . . might be required of even an advertisement of the
(continued...)

d. California's Use of the Presumption Is Constitutional.

In civil matters, the test of the constitutional validity of presumptions affecting the burden of proof is whether a rational connection exists between the fact proved (i.e., the testimonial) and the presumed fact (i.e., that the testimonial violates rule 2-101), and whether that inferential connection is not so unreasonable as to be arbitrary. Tot v. United States, 319 U.S. 463, 467-468, 63 S.Ct. 1241, 1245 (1943).

If the inferential nexus can be demonstrated, the burden may shift. Leary v. United States, 395 U.S. 6, 36, 89 S.Ct. 1531 (1969). A corollary consideration is the comparative

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[11](...continued)
kind ruled upon today so as to assure that the consumer is not misled.")

convenience between the parties of producing evidence of the fact presumed. Tot, supra, 319 U.S. at 467. See also Morris v. Williams, 67 Cal.2d 733, 760, 63 Cal.Rptr. 689, 433 P.2d 697 (1967) (evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competency of one of the parties). In the instant case, like the defendants in Tot and Morris, Oring had "at least an equal familiarity with the facts, and [in commercial speech] in most cases a greater familiarity with them than [the State Bar]." Tot, supra, 319 U.S. at 468-469.

Rule 2-101(D) creates a presumption as is defined in California Evidence Code sections 605 and 606. Rule 2-101(D), Rules of Professional Conduct. See p. 6, above. California Evidence Code section 605 authorizes a presumption to be created in order to implement a public policy; as such,

it does not require the inferential link between the basic and presumed fact discussed above. However, in the case of the presumptions of the Standards promulgated by the State Bar Board of Governors, the rational inferential connection exists as well. The public policy is to prevent deceptive, confusing or misleading attorney advertising through omission or affirmative act. The presumed fact in this case is, in effect, that a testimonial legal advertisement can, unless carefully presented, be misleading through omission and manner of presentation.

Due process is not violated by a presumptive shifting of the burden of proof if the presumed fact is more likely than not to flow from the basic fact giving rise to the presumption. Leary, supra, 395 U.S. at 36.

The standard of proof required in rebuttal is evidence which creates in the minds of those reviewing the testimonial a conviction that the testimonial more probably than not does not violate the provisions of rules 2-101(A)(2) and (3). This is the civil standard of preponderance of the evidence which applies in California unless specific law provides otherwise. See Cal. Evid. Code, § 115, above, at pp. 5-6.

Due process is not violated when an attorney charged with violation of rule 2-101 is apprised of the factual material upon which the State Bar will rely for its decision, in order that he or she may rebut the evidence. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 288, n. 4, 95 S.Ct. 438, reh. denied in 420 U.S. 956, 42 L.Ed.2d 447 (1974) quoted in Zauderer, supra, 471 U.S. at 671 (Brennan, concurring and dissenting).

The obvious and appropriate rebuttal to the presumption regarding testimonials is the testimonial itself: Is it truthful? Is sufficiently complete information included? Is misleading or deceptive material excluded? It is either deceptive or not.

Due process requires that the rule disclose the specific issues the attorney charged must meet. In re Gault, 387 U.S. 1, 33-34 (1967), quoted in Zauderer, supra, 471 U.S. at 671 (Brennan, concurring and dissenting).

The Court has stated, "The Fourteenth Amendment's Due Process Clause 'insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294 (1972) quoted in Zauderer, supra, 471 U.S. at 665

(Brennan concurring and dissenting).

Brennan comments,

> "Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for 'conduct which all responsible attorneys would recognize as improper for members of the profession.' [Citation] Zauderer, supra, 471 U.S. at 666 (Brennan concurring and dissenting.)"

Rule 2-101(A) at subdivisions (1), (2) and (3), provides the requisite degree of specificity:

> "(A) A 'communication" . . . shall not:
>
> "(1) Contain any untrue statement; or
>
> "(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or
>
> "(3) Omit to state any fact necessary to make the statements made, in the light of the

> circumstances under which they are made, not misleading to the public; . . . Rule 2-101(1)-(3), Rules of Professional Conduct."

Thus, whether the Court applies the standard of a person of ordinary intelligence or an attorney specially trained, the prohibition against misleading advertising contained in rule 2-101 is not unconstitutionally vague.

Oring is a lawyer. He has a better idea than most as to what the words in his advertisement say and what they do not say. If he had spent a little more time in the preparation of the ad (i.e., any time at all), he would no doubt have added an appropriate explanation or disclaimer. Again, what the State Bar requires is more information--not less--in the ad. If a one-minute spot radio commercial is too short to tell the "whole truth," that is a burden that Oring should bear--not the illiterate or functionally illiterate potential

consumers of legal services whom he was targeting.

The presumption device, because it falls short of an absolute ban on advertisements, passes constitutional muster as a reasonable and the least extensive restriction necessary to serve the State Bar's interest in protecting against misleading lawyer advertising. Central Hudson, supra, 447 U.S. 566, 100 S.Ct. at 2350.

B. REGARDLESS OF THE PRESUMPTION, ORING'S AD WAS MISLEADING AND VIOLATED RULES OF PROFESSIONAL CONDUCT AND WARRANTED DISCIPLINE.

It is well-settled that the First Amendment overbreadth doctrine does not apply to commercial speech. Bates, supra, 433 U.S. at 379-381; Shapero v. Kentucky Bar Ass'n., supra, 56 L.W. at 4535. We have already shown that the California presumption regarding testimonials is constitutional. But regardless of the

presumption, the advertisement in question is not protected by the First Amendment in any event, since it clearly violates both rule 2-101(A)(2) and rule 2-101(A)(3) of the Rules of Professional Conduct. As the starting point of this part of the analysis, therefore, it must be determined whether or not Oring's particular advertisement is misleading.

The stipulation in this case provides:

> "4. The Statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was [sic] present at the time the radio spot was recorded." (Appendix D, Jurisdictional Statement, App. 9.)

There is no finding by the State Bar Court, either by the Hearing Panel or the Review Department, that the advertisement is or is not misleading. However, we submit testimonials can be misleading even if

every word contained therein is true and this advertisement so demonstrates.

"Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading." Friedman, supra, 440 U.S. at 9-10. Oring's advertisement is such a case. While technically true as far as it goes, it is misleading and deceptive with respect to what it doesn't say.

1. The Advertisement in Question Omits Any Mention of an Insurance Bad Faith Claim and, for All that Appears, the "Double Recovery" Arose Solely from an Auto Accident.

The advertisement begins with the statement by Oring's client, Sharon S., "I was rear ended on the San Diego freeway." The announcer who immediately follows her testimonial then states, "Grey and Oring, That's G-r-e-y and Oring, a private law firm. If you have an automobile accident, you need a lawyer." (Emp. added.) In the

body of the testimonial, Sharon S. relates how she

> "ended up in court . . . [and] got a nice award of money . . . all of a sudden got a telephone call from Grey and Oring . . . [who] hadn't liked the way the insurance company had treated [her] and wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial."[12]

Although there are serious concerns with the confusing information abundant in the advertisement,[13] the more pernicious fact remains that Oring's advertisement, by failing to indicate that Sharon S. obtained

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12 All quoted material, unless otherwise stated, is from Oring's advertisement, the full text of which appears above at page 18.

13 E.g., from whom did Sharon S. obtain a "nice award"? Did she obtain it from the insurer for the other driver or from her own insurance company? (I.e., she could collect from her own insurance company if she had uninsured motorist coverage and the other driver was uninsured.) Which company was it whose conduct Grey and Oring found objectionable? What was the "nice award" and how do we evaluate its niceness?

money under two separate and distinct causes of action, gave the impression that she received "double the amount of the original trial" through the outstanding legal ability of Oring's firm to obtain damages arising solely from her automobile accident. No mention is made in the ad of the term "bad faith" or about a cause of action for insurance company bad faith: for all the ad says, there is only one cause of action involved. The announcer's more authoritative summing up, "If you have an automobile accident, you need a lawyer," reinforces that misleading impression.[14]

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14 Oring suggests that, as a radio ad, the testimonial was directed to illiterates and functional illiterates. (Br. App., p. 13.) If this is in fact the case, that population would likely be among the least likely to recognize that Sharon S.'s recovery was for a claim of bad faith against an insurer, separate and apart from the claim. If anything, the medium of radio serves to further enhance the advertisement's misleading qualities. While a radio advertisement may be "turned off," (continued...)

Although Oring boldly asserts that he in fact did "inform the public about a cause of action based on an insurance company's breach of the covenant of good faith" (Br. App., p. 21), the testimonial not only fails even to hint at a cause of action for bad faith, it effectively conceals that information.

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[14](...continued)
it cannot be re-read to discern its meaning. In addition, it utilizes whatever emotional impact is present in greater measure in the human voice than in written material. Radio advertising would appear to fall somewhere between the "coercive force of the personal presence of a trained advocate," and "means of conveying information about legal services that is more conducive to reflection and exercise of choice." Zauderer, supra, 433 U.S. at 384. Compare Bates, supra, 433 U.S. at 384. ("[T]he special problems of advertising on the electronic media will warrant special consideration.")

California has no restrictions on attorney advertising which relate to the medium by which it is delivered. However, in making an overall determination of whether or not a particular advertisement is misleading, the enhanced impact and effect of the electronic media cannot be ignored.

Oring further compares Sharon S.'s "informing" the public about the bad faith cause of action to the information acquainting persons with their legal rights contained in the Zauderer advertisement. However, his advertisement does not stand up well in this comparison.[15]

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15 The ad in Zauderer read:

> "The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious [health problems and consequences] . . . . If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women in such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients." 471 U.S. at 631.

A comparison of the two advertisements is informative. The Zauderer ad contains specific information about the injury giving rise to the cause of action and the fact that it might not be too late for a lawsuit. Oring's ad contains no information about any cause of action. It refers only vaguely to automobile accidents and does not even

(continued...)

The fact that automobile accidents often result in lawsuits is common knowledge. A cause of action against an insurer for breach of the implied covenant of good faith and fair dealing is a far more esoteric and unfamiliar matter. Moreover, the likelihood that facts constituting a bad faith cause of action will be present in any great number of automobile accidents is virtually nonexistent.

Contrary to Oring's contentions, his ad fails to inform the public about the cause of action for bad faith which resulted in the second recovery for Sharon S., fails to note the rarity of the availability of a bad

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15(...continued)
mention bad faith. Zauderer names the parties, while Oring's ad does not make clear who the defendants were in the bad faith action. Zauderer objectively and clearly informs the reader of legal rights. Oring's ad does not inform as to what the real cause of action in the second recovery was and leads the listener to "great expectations" on the basis of little or no information.

faith claim, and fails to advise that other persons' experiences will be different. Rather, the advertisement, in its silence, takes advantage of public ignorance to create a false impression of a "David" in the person of Grey and Oring taking on "Goliath," the insurance company. Oring's advertisement, by its material omissions, creates an expectation with virtually no probability of fulfillment. See Bates, supra, 433 U.S. at 383, n. 37 ("The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience.")

2. There Are Other Misleading Aspects to the Advertisement and Their Cumulative Effect Is Overwhelming.

a. What Is a "Nice Award"?

Sharon S. stated that she "got a nice award of money . . . and [that] suddenly the insurance company offered me a settlement of double the amount of the original trial."

Nothing in the advertisement provides a reference point for what Sharon S. might consider a "nice award."[16] Nothing indicates any expertise on her part to determine the value of her case. We are told, however, that the insurance company's offer of "double the amount of the original trial," was sudden. The implication of this information may well be quite different to an experienced attorney, who might question the potential value of a bad faith claim that "suddenly settled," than to a naive potential client who hears only about a quick doubling of money.[17]

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16 E.g., did the award, after attorneys' fees, exceed her medical bills? Would she have been as happy if she had not received the second settlement which was double the amount of her first recovery?

17 Compare FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116, 58 S.Ct. 113, 82 L.Ed. 141 (1937) ("The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its

(continued...)

b. <u>The Ease with Which Sharon S. Obtained a "Nice Settlement."</u>

Early in the testimonial, Sharon S. states that "my medical bills were piling up," a common financial hardship. Although this financial fact is included, the entire advertisement makes no mention of having to pay Grey and Oring anything for their services, however reasonable that requirement may have been. We do not contend that the absence of that information in and of itself is deceptive; surely it is commonplace that attorneys get paid for their services. Rather, we contend that the omission of that information from the

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17(...continued)
power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business . . ." (describing a fraudulent representation of a bargain price for an encyclopedia).) This statement applies to the dangers of misrepresentation borne of the gap in experience and training between attorneys and consumers of legal advertising.

advertisement contributes to the overall illusion of ease and effortlessness involved in getting a double recovery of damages.

In sharp contrast is the familiar observation of Justice Learned Hand, "[A]s a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." L. Hand, <u>The Deficiencies of Trials to Reach the Heart of the Matter</u>, in 3 Association of the Bar of the City of New York, Lectures on Legal Topics 89, 105 (1926). But Oring's advertisement would lead the consumer to believe that it is easy--a snap--to collect from insurance companies if one only retains those expert manipulators of the legal system, Grey and Oring. In addition, as has been noted earlier, we don't know which insurer paid the second "award." The result is that the facts included in the testimonial are ambiguous, and the facts left out cause it

to be misleading. In that aspect, the advertisement is misleading.

c. Lawyers Seldom "Immediately Take the Case."

In Sharon S.'s experience, she was "recommended to Grey and Oring [and] they immediately took the case." The implication that any other potential client would have a similar experience is also misleading. Personal injury lawyers, typically working on a contingency fee basis, must be selective in the cases they accept. Operative facts such as a potential client's injuries and medical history, availability of evidence and witnesses, and issues such as causation and comparative negligence in individual cases, determine whether or not an attorney will take a case. The clear-cut cases which lead to immediate acceptance by an attorney are likely the exception rather than the rule. The fact that the experience of a single

client does not predict the likely experience of other potential clients renders Oring's advertisement misleading and demonstrates why testimonial advertising in general is inherently misleading.

In sum, the numerous misleading statements and omissions in Oring's ad place it squarely in violation of rule 2-101(A)(2) and 2-101(A)(3). The judgment of discipline was fully justified and should be upheld.

C. THE STIPULATION AS TO FACTS AND DISCIPLINE IS BINDING ON ORING AND HE SHOULD NOT BE PERMITTED TO CIRCUMVENT IT.

Oring stipulated to accept the discipline imposed on his law partner Grey. Br. App., p. 8. Grey litigated all the issues raised by Oring and this Court denied certiorari. A public reproval was imposed on Grey, and that discipline is long since final. Oring has never moved to set aside the stipulation. It is recognized that a denial of certiorari is not a ruling on the

merits; subsequent to denial of certiorari in one case, another party in another case may raise the identical issues which the Court may determine to hear and it may ultimately find constitutional infirmity where none was found before. We submit, however, that an appellant should not be permitted to raise such challenges when he has previously entered into a valid stipulation to be bound by what happened in that previous case.

Constitutional rights are waived by counsel every day in countless instances. The key issue has always been whether there was an informed and knowing waiver of those rights. Here, if Oring's stipulation is to mean anything at all, it should mean that he is to receive and accept whatever discipline, if any, is imposed on Grey after Grey has exhausted his constitutional challenges. The stipulation means that

Oring's star rises or falls depending on what happens to Grey. There is nothing in the stipulation that reserves to Oring the right to sit back and await the outcome of Grey v. State Bar and, if he should be dissatisfied with that outcome, pursue the litigation de novo on his own behalf. If stipulations are to have such little meaning, few would be entered into. Oring wants to have his cake and eat it, too.

Oring is an experienced lawyer; he was represented by counsel who has had extensive experience representing lawyers before the State Bar Court. Under California law, a stipulation as to facts and discipline, once approved by the Hearing Panel and the Review Department, is binding on both parties, i.e., the lawyer and the State Bar. The fact that it is not binding on the California Supreme Court does not diminish

its force and effect on the parties themselves.

Rule 408(a), Rules of Procedure of the State Bar, provides that a stipulation as to facts and discipline shall bind the parties in a disciplinary proceeding if adopted by the Review Department. Rule 408(a) reads in relevant part:

> "(a) Once adopted by the review department, a stipulation as to facts and disposition shall bind the parties in the proceeding or investigation. Once approved, the stipulation may not be withdrawn or modified without the written approval, upon good cause shown and notice duly given, of the referee or hearing panel having approved the stipulation or, of the presiding referee. Any request for a withdrawal or modification of the stipulation must be served and filed within fifteen (15) days of service of the order approving the stipulation."

Rule 408(a) provides for withdrawal or modification of such a stipulation. As mentioned above, Oring made no effort at any

time to withdraw or modify the stipulation. It has long since become final.

In California, the ultimate decision as to the degree of discipline to be imposed rests in the California Supreme Court. Neither a lawyer subject to a disciplinary proceeding nor the State Bar can waive the California Supreme Court's authority to independently review the record and impose appropriate discipline. Martin v. State Bar, 20 Cal.3d 717, 723 (1978). That is why every disciplinary stipulation in California, including Oring's, states that it is not binding on the California Supreme Court.[18] However, the California Supreme

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[18] Rules of Procedure of the State Bar, rule 406, reads in relevant part:

> "The proposed stipulation as to facts and discipline shall set forth each of the following:
>
> "(i) stipulations as to proposed discipline are not binding upon the Supreme Court . . . ."

Court has held that parties are bound by their stipulations. In re Duggan, 17 Cal.3d 416, 422 (1976). Only in the event the court is considering the imposition of more severe discipline than that to which the attorney and the State Bar have stipulated will the court relieve an attorney of the stipulation, and then only as to the legal conclusions therein contained. Innis v. State Bar, supra, 20 Cal.3d at 558.

The California Supreme Court did not impose greater discipline than was stipulated to by the parties. Even if it had, Oring would still be bound by the factual stipulation. Innis, supra; Giovanazzi v. State Bar, 28 Cal.3d 465, 470-471 (1980).

Oring nonetheless blithely proceeds as if the stipulation were never executed and never existed. If stipulations are to continue to serve the valid public purposes

of obviating formal proof and reducing the need to try every case in order to obtain a valid judgment, Oring's stipulation should not be set aside.

As the foregoing demonstrates, Oring's contention that the stipulation was not binding on the California Supreme Court and, therefore, was not binding upon him, Br. App., p. 45, is completely without merit.

Also, Oring's argument that because he received a letter saying he could "seek Supreme Court review" of the State Bar Court's action in imposing the public reproval, the impact of the stipulation is erased, ignores established California law: he would not be permitted to attack the discipline imposed unless he could persuade the California Supreme Court that, for some reason, the stipulation should be set aside. This he never tried to do.

Oring's last-ditch attempts to evade and escape from the consequences of his valid stipulation, knowingly executed and never challenged in the California Supreme Court or elsewhere, should not be rewarded. The stipulation should be upheld.

D. THE IMPORTANCE OF THE PUBLIC TRUST PLACED IN THE LEGAL PROFESSION MANDATES A POLICY REQUIRING UTMOST COMMITMENT TO THE QUALITIES OF TRUTH-SPEAKING AND A HIGH SENSE OF HONOR.

Public policy supports efforts by the state to ensure that lawyer advertisements are free from deception and are not misleading. We contend that lawyers are different from practitioners of other trades and professions and must be held to higher standards of truthfulness--standards which the public expects and deserves to see observed and are in fact imposed on attorneys by statute, rules of conduct and long-standing tradition. Lawyers must do more than simply peddle their services on

the street because they do not deal at arms length with their clients or prospective clients. The marketplace rule of caveat emptor does not apply in the legal profession.

In California, a lawyer has a statutory duty to support the law (Cal. Bus. & Prof. Code, § 6068(a)); to maintain the respect due the court (Cal. Bus. & Prof. Code, § 6068(b)); to maintain only such actions as appear just (Cal. Bus. & Prof. Code, § 6068(c)); to employ only such means as are consistent with truth (Cal. Bus. & Prof. Code, § 6068(d); to preserve the confidence of his clients (Cal. Bus. & Prof. Code, § 6068(e)); and to not encourage the continuance of an action from any corrupt motive or intent (Cal. Bus. & Prof. Code, § 6068(f).

The purpose of the Rules of Professional Conduct is, in essence, to

ensure that lawyers "are ethically obligated to put their clients' interests ahead of their own." Shapero, supra, 56 L.W. at 4536, O'Connor dissenting. Examples include the attorney's obligation not to charge unconscionable fees (rule 2-107), not to accept employment without disclosing his relation to an adverse party (rule 5-102), to communicate all written settlement offers (rule 5-105) and, when in trial, not to employ means inconsistent with the truth (rule 7-105).

The California restrictions on lawyer advertising serve the same valid public purposes as do the other Rules of Professional Conduct. They seek to protect clients and prospective clients by "foster[ing] the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices about legal counsel."

Rule 2-101, Preamble. Those restrictions are aimed at insuring that lawyer ads are true, that they are not misleading, deceptive or coercive, and that they do not contain any material omissions. Other than adhering to these minimal requirements, California lawyers may advertise in any manner they please, in print or on electronic media, and say whatever they wish.

A testimonial advertisement, with its characteristic omission of material facts and its appeal to the emotional rather than the rational side of the persons who hear it, does not provide responsible information upon which the public can make an informed judgment as to the legal services an attorney offers. If anything, testimonials compound the confusion for the unsophisticated viewer, recipient or listener. California rules require only

that a testimonial advertisement, when used, contains sufficient information so that the advertisement does not mislead. Therefore, if a lawyer chooses this form of advertisement, he or she should bear the minimal burden of demonstrating why a particular ad provides complete information and does not mislead. That burden is particularly fair and appropriate, since in the final analysis, only the lawyer is in a position to demonstrate the truthful, non-deceptive nature of his or her ad.

Oring has failed to make any showing at any stage of the disciplinary proceeding as to why his ad is not misleading or deceptive. Yet he concedes that the ad was designed to appeal specifically to the illiterate and functionally illiterate, perhaps the group least able to evaluate its content. He clearly sought to take

advantage of them in advancing his own pecuniary gain.

It would go against the whole fabric of the standards of ethics and professional responsibility of attorneys if misleading ads such as the Oring testimonial are permitted to flourish. A lawyer's commitment and oath to put the client's interest ahead of his or her own and to deal in candor and utmost good faith with clients, third parties and the court at all times will be seriously eroded if there is no longer a duty to speak the truth to prospective clients.

The public has a right to insist that, particularly in matters of truthfulness, lawyers will continue to be held to high standards of conduct. Upholding the California Supreme Court's order of discipline of Oring in no way conflicts with this Court's previously stated positions in

granting First Amendment protection to selected forms of attorney advertising. On the contrary, this case poses a clear opportunity to define the line past which commercial advertising by lawyers may not go: into the territory of the misleading and deceptive communication.

CONCLUSION

The facts are simple and undisputed. Oring made use of a radio advertisement that consisted of a testimonial from a former client who extolled his firm's effectiveness and speed in obtaining a "double recovery" for her following an automobile accident. While the statements in the advertisement were true as far as they went, they did not go far enough to dispel confusion as to what actually happened in the client's case, nor to avoid misleading the listening public on the nature and existence of her two separate causes of action and the likely

unavailability of similar results to future clients. In addition, the advertisement totally ignored the importance of facts, applicable law and factors involved in an attorney's selection of clients in its representations about Oring's firm. Consequently, by failing to provide sufficient and essential information to a public otherwise ill-equipped to evaluate its content and make informed decisions, the testimonial served only to vouch for quality, which is not capable of being measured in any reliable way in the advertising context.

The California Rules of Professional Conduct, consistent with the position taken by the Federal Trade Commission, regulate usage of such testimonials precisely because they are particularly susceptible to abuse. As the Preamble to the State Bar's lawyer advertising rules states, their purpose is

to "foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel." Operationally, a rebuttable presumption is applied, stating that testimonials and endorsements violate rule 2-101 of the Rules of Professional Conduct concerning communications to obtain professional employment. Thus, the respondent attorney is obliged to show how and why an advertisement falling within one of the categories covered by the rule is not misleading or deceptive.

Contrary to Oring's assertions, however, there is no "blanket ban" on testimonial advertising, and no different treatment provided for in the rules or in the disciplinary proceeding because he chose an electronic medium as opposed to a print medium. What California has is a system

aimed at protecting consumers of legal services, while at the same time allowing dissemination of truthful and meaningful information about lawyers seeking employment opportunities. It is true that the system as presently devised does not tolerate misleading, deceptive or coercive advertising, but in virtually all other respects, it is extraordinarily permissive.

Oring is striving to push First Amendment protection of commercial speech into a new domain: advertising that is misleading and deceptive. Moreover, he attempts to do so with total disregard for his own knowing, prior and binding stipulation as to facts and degree of discipline. The State Bar has abided by its part of the agreement in recommending the same discipline for Oring as his law partner received--public reproval--but Oring wants another shot. Under California law, where

the California Supreme Court has declined to impose greater discipline than that stipulated to by the parties, the stipulation becomes final. That is the situation in the present case, notwithstanding Oring's refusal to accept it.

Finally, the Court is presented with an opportunity to refine and define the line on attorney advertising. If misleading and deceptive advertising becomes the norm, efforts to teach and enforce rules of professional conduct will be so undercut as to be wholly ineffectual. The California approach has balanced the occasionally competing interests of free speech and public protection and acknowledged the continuing responsibilities of members of the Bar to conduct themselves with their past, present and future clients, opposing

counsel and the courts with a high level of honesty and integrity.

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Dated: September 23, 1988

Respectfully submitted,

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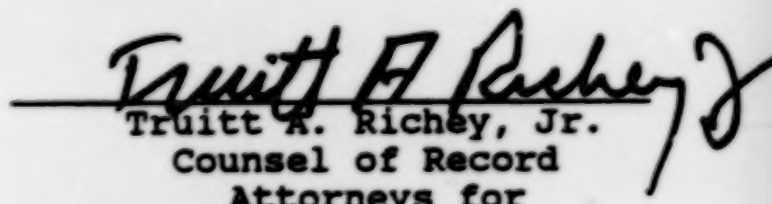

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In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF CALIFORNIA IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

REPLY BRIEF OF APPELLANT MARK H. ORING

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REPLY BRIEF OF APPELLANT MARK H. ORING

I.

INTRODUCTION

Appellant, Mark H. Oring, has been disciplined for presenting a testimonial advertisement which was never found to be false, misleading or deceptive. In fact, the State Bar stipulated that the advertisement was true. The basis for discipline was a presumption that testimonial advertising is false, misleading or deceptive. Under this Court's prior decisions, such a presumption placing the burden on the speaker to prove the protected nature of the speech, and effectively banning any testimonial advertising, is unconstitutional.

The California State Bar, in its brief, argues that this presumption is constitutional and, in any event, Appellant's advertising is misleading. As we shall demonstrate, if this Court were to accept the State Bar's argument in this case, it

> "would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. . . .[R]ecent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on the would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985).

The State Bar's brief grossly distorts the legal and factual issues of his case and is replete with numerous

unsupported contentions. Among these distortions are the following: The State Bar contends that Oring's advertisement is misleading, but it ignores the advertisement as a whole, including the fact that the advertisement mentions that the *new and different* recovery was specifically dependant upon the insurance company's *"constant" harassment;* thus, the State Bar misstates and omits certain portions of the advertisement which make it complete and *nondeceptive.* It contends that experience has shown testimonial advertising to be misleading; yet, it fails to provide even a scintilla of *evidence* demonstrating this contention. Brief of Appellee, p. 38.

The State Bar argues that the Federal Trade Commission has recognized that testimonial advertising requires certain restrictions but *ignores the fact that the burden of proving that testimonials are misleading has always been, and still is, on the F.T.C.*

The State Bar fails to even address the issue concerning the chilling effect of the presumption which places the burden of proof upon the accused attorney to demonstrate that his testimonial advertisement is not false, misleading or deceptive. It fails to address the fact that, under the presumption, if the accused attorney proves that it is equally likely that his advertisement is not false, misleading or deceptive (i.e., even if the advertisement is shown to be false, misleading or deceptive), *he will be disciplined.*[1]

The State Bar contends that "[i]f the advertisement is indeed truthful, free of deception and is not harassing, it is a simple matter for the advertising lawyer to so demonstrate." Brief of Appellee, pp. 62-63. It further contends

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[1] This contention is especially important here, where the advertisement was stipulated to be truthful and was never found to be misleading.

that "[t]he obvious and appropriate rebuttal to the presumption regarding testimonials is the testimonial itself: Is it truthful? Is sufficiently complete information included? Is misleading or deceptive material excluded? *It is either deceptive or not."* Brief or Appellee, pp. 68-69; emphasis added. Yet, later, the State Bar takes a *completely contrary position,* stating that "[t]he burden is particularly fair and appropriate, since *in the final analysis, only the lawyer is in a position to demonstrate the truthful, nondeceptive nature of his or her own ad."* Brief of Appellee, p. 96; emphasis added. How could such a "simple matter," which can be proven from the advertisement alone, be demonstrated only by the accused lawyer? Why should the State Bar be relieved of the burden of proving such a "simple matter" when First Amendment rights are at stake?

The State Bar contends that the presumption at issue here is "the least extensive restriction necessary to serve the State Bar's interest in protecting against misleading lawyer advertising." (Brief of Appellee, p. 72). Yet it has proposed a new standard which places the burden of proving that a testimonial is misleading upon the Bar so long as the testimonial "also contains an express disclaimer such as 'this testimonial does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter' "? (Joint Appendix, p. 10). The proposed standard is certainly less burdensome than the standard now in effect and, at the very least, the proposal constitutes an implicit acknowledgment that the Bar's regulatory goals can be met by a less restrictive regulation.

The State Bar contends that Appellant Oring "clearly sought to take advantage of [the illiterate and functionally illiterate] in advancing his own pecuniary gain." (Brief of Appellee, pp. 96-97). *This statement is wholly unsupported by the record or any reasonable inference therefrom.* The record is devoid of any consumer complaints against Appellant Oring and, in fact, there were none. (Brief of Appellant, p. 7).

Finally, even assuming, *arguendo*, the State Bar were correct in all its contentions, the advertisement, itself, caused no harm and in fact benefited the public. Unlike certain advertisements,[2] this advertisement did not propose a purchase. Rather, it was an invitation to come into the office for a free consultation.[3] Studies indicate that existing sources of information about the availability of legal services are insufficient. Shall we continue to keep the public in the dark?

II.

APPELLANT ORING'S TESTIMONIAL IS TRUTHFUL AND NONDECEPTIVE.

Sharon S.'s statements, the basis for Appellant Oring's discipline, consisted, in substance, of the following remarks which were stipulated by the State Bar as *truthful*: Sharon S. was *rear ended* on the freeway, and *her*

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[2] For example, a soap testimonial proposes a purchase of soap. If the advertisement is successful, a consumer will go to a supermarket and make a purchase based on the advertisement alone.

[3] Of course, if any misstatements occurred at that time, the attorney would be subject to discipline. But this would be the case whether the client came to the office because of advertising or because of referral or by any other manner.

medical bills were piling up. The insurance company involved was *"giving me a hard time, constantly harassing me, just all in all gave me a bad time."* An attorney, who did not take cases that might go to trial, recommended her to Grey and Oring, who took the case immediately. The case ended up in court and Sharon got a nice award of money. Then, Grey and Oring telephoned her. *They had not liked the way the insurance company had treated her* and wanted to take the insurance company to trial because of this. Because of this, the insurance company offered Sharon S. an additional settlement.[4]

The State Bar contends that "these statements comprise a representation of quality and, as such, are misleading." Brief of Appellee, p. 35. Yet, these statements are devoid of any hyperbole, any laudatory adjectives or any statements of the amount recovered. The advertisement does not utilize objectionable subjective terms such as stating that Grey and Oring are "experts," "highly qualified," or "competent" in the field of personal injury or bad faith litigation. *Cf. Spencer v. Honorable Justices of Supreme Court of Pennsylvania*, 579 F.Supp. 880, 887 (1984). Rather, the advertisement utilizes an actual, *objective*, and admittedly truthful fact situation which was properly handled by Grey and Oring. *Id.* at 888.

Appellant's advertisement simply opens the channel of communications to the public and, thus, serves the public's best interest. *See Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557. It informs the public of the fact that if an insurance company

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[4] The advertisement went on to mention a telephone number to call and stated that there would be no charge for a consultation.

harasses a member of the public, it could be held liable to that individual. While the advertisement admittedly fails to mention "the term 'bad faith' " (Brief of Appellee, p. 76), the use of such an esoteric legal term would be more confusing to the public than the use of the *factual description of such term, i.e., harassment. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 631 (1985) [no mention of the term "negligence" in advertisement, but mention of *injuries which were, in fact, caused by Dalkon Shield*].[5]

The State Bar's contentions questioning the use of the term "nice award" (Brief of Appellee, pp. 80-81, asking "what is a nice award?") is contrary to the State Bar's explicit reasons for implementing the presumption at issue. In recommending the adoption of the presumption that testimonials are misleading, the State Bar Committee Report to its Board of Governors stated:

> "Advertising of . . . large verdicts may lead the public to believe that the likelihood of obtaining a similar result is high . . . " (State Bar Motion to Dismiss or Affirm, p. 22).

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[5] Further, the State Bar's unsupported assertion that a cause of action for bad faith "is a far more esoteric and unfamiliar matter" and is unlikely to be present in any great number of automobile accidents (Brief of Appellee, p. 79) is contrary to authority. As demonstrated in Appellant's Brief, p. 32, to date, there have been *hundreds of appellate court decisions* regarding bad faith issues. In any event, even if the State Bar's arguments were correct, should advertising be barred simply because the advertised product is not purchased with any great regularity? Should the public be informed only about causes of action they are already familiar with, or should we open the channels of communication to the public and inform them about less known causes of action recognized by the law?

Yet, now, the State Bar contradicts this reasoning by arguing that "[n]othing in the advertisement provides a reference point for what Sharon S. might consider a 'nice award.' " Brief of Appellee, p. 81. Certainly, this "Catch 22" argument, and the many others which the State Bar propounds in its brief, demonstrate the difficulties an accused attorney would encounter in sustaining the burden of proving that his advertisement is not false, deceptive or misleading.

The other arguments of the State Bar are equally unimpressive. For example, their argument that "[l]awyers seldom 'immediately take the case' " (Brief of Appellee, pp. 84-85), fails to consider that the advertisement stated that Sharon S. was *rear-ended* and that her *medical bills were piling up*. It is hereby submitted that few, if any, personal injury lawyers would refuse to immediately take a case where a potential client was rear-ended and had substantial medical bills.

In any event, the public is far better off seeing an attorney for a free consultation because of an accident or because they were harassed by an insurance company than not seeing an attorney at all, especially since personal injury actions are typically taken on a contingency basis. Perhaps this is one reason why this Court has stated that, even if advertising is incomplete, the receipt of some information is better than the receipt of no information at all. *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562; *Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977).

III.

EXPERIENCE HAS SHOWN TESTIMONIAL ADVERTISING TO BE HELPFUL, RATHER THAN DETRIMENTAL, TO THE PUBLIC.

Recently, testimonial advertising was examined in Brown, *Advertising in the "Learned Professions": The Case for Price Comparisons and Testimonials*, 11 *S.Ill.Univ.L.J.* 1205 (1987). In concluding that testimonial advertising is helpful to the public and should be permitted, Brown states:

> "Consumers are genuinely interested in hearing the opinions of those who have used the services of a particular lawyer or doctor. A statement by a satisfied client, 'I went to the Law Office of Smith and Brown and found their service to be very good and their prices quite reasonable,' is arguably no more misleading than an ad which lists prices. Certainly, the individual needs of a particular client may make the services of a particular lawyer more suitable. *Consumers, however, are capable of determining the value of an endorsement and of recognizing that the statement is merely the opinion of a presumably satisfied client. A paternalistic, prophylactic approach by government which attempts to insulate the consumer from potentially misleading advertisements is both unnecessary and arguably unconstitutional.*" Emphasis added.

Further, the asserted dangers of deceptive advertising by attorneys are greatly exaggerated. As stated by Federal Trade Commissioner Terry Calvani, et al., in *Attorney Advertising and Competition at the Bar*, 41 *Vand.L.Rev.* 761, 777 (1988):

> "[A]dvertising may actually reduce consumer deception and improve the ability of consumers to evaluate the quality of legal services. In particular, advertising can induce customers to seek additional information about the lawyer through other sources, which reduces the likelihood of consumers being deceived by advertising. Additionally, advertising may reduce the incentive for firms to run deceptive advertisements. Because advertising encourages consumers to learn more about the firm, attorneys who advertise realize that they will develop a negative reputation by making false or misleading claims."

See, also, Kuehl and Ford, *The Promotion of Medical and Legal Services: An Experimental Study*, Contemporary Marketing Thought: 1977 Educator's Proceedings 39-44 [*content* of advertising not as important as exposure to *alternative sources* of advertising]. Thus, all advertising, including testimonial advertising, encourages discussion by consumers and induces them to seek additional information. If the advertisement can be substantiated, by, for example, a personal friend or known professional, then a consumer is much more likely to act upon it. Kuehl and Ford, *supra*.

Surveys have also demonstrated the public's need to know is substantially more important to them than is the need to be protected from advertising. Linenberger and Murdock, *Legal Service Advertising: Wyoming Attorney Attitudes Compared With Wyoming Consumer Attitudes*, 17 *Land and Water L.R.* at 223-224 (1982). Consumers believe that the control of advertising lessons competition among attorneys and results in higher prices. Additionally, they are dissatisfied with existing sources of information. *Id.* at 229. And consumers believe that advertising would "weed out the bad lawyers and make the profession more reputable." *Id.* at 238. Certainly, the public's opinions concerning advertising demonstrate that existing sources of information are inadequate and support the need for testimonial and other forms of advertising.

Even the State Bar has cited authority to the effect that "the same standards apply to testimonial statements

as to any other advertising claim." Brief of Appellee, p. 42, citing Caffey and Kaufman, *The Laws of Advertising in Franchising*, 412 PLI/Comm. 689, 702 (1987). Yet, the presumption invoked against Appellant treats testimonials differently.

Certainly, the Federal Trade Commission rules cited by the State Bar are "instructive." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 649. But, unlike the State Bar which benefits from this presumption, even the F.T.C. must sustain the burden of proving that testimonials are false, misleading or deceptive. See *Simeon Management Corporation v. Federal Trade Commission*, 579 F.2d 1137, 1144 (9th Cir. 1978).[6]

The State Bar's arguments seem to be grounded on the argument that it is better to present less, rather than incomplete, information. But this Court has already discarded such an argument, stating:

> "[t]he argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect this argument rests on an underestimation of the public. *If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." Bates v. State Bar of Arizona*, 433 U.S. at 374-375; emphasis added.[7]

[6] In *Zauderer*, 471 U.S. at 646, n. 13, this Court noted that the American Bar Association "shares the view that weeding out false or misleading advertising by attorneys from advertising that is accurate and nonmisleading is neither impractical nor unduly burdensome" and that the F.T.C. has concluded that "application of a 'false or deceptive' standard to attorney advertising would not pose problems distinct from those presented by the regulation of advertising generally." Why, then, should the State Bar be entitled to a less onerous burden than the F.T.C.? Logic and the importance of First Amendment protection dictate otherwise.

IV.

THE STATE BAR RULE, WHICH PRESUMES THAT TESTIMONIALS ARE FALSE, MISLEADING OR DECEPTIVE, IS (A) BROADER THAN REASONABLY NECESSARY AND (B) VIOLATES DUE PROCESS.

A. THE PRESUMPTION IS BROADER THAN REASONABLY NECESSARY TO PREVENT THE PERCEIVED EVIL.

The fact that the State Bar has proposed new standards, which would eliminate the presumption that testimonial advertising is misleading so long as a disclaimer is included, is evidence that even the State Bar realizes that the presumption at issue here is not the least restrictive means available to serve the governmental interests at stake. Joint Appendix "C," p. 10. Perhaps the State Bar has proposed this new rule because this Court has emphasized that disclosure requirements "trench more narrowly on an advertiser's interests" and are a more preferred remedy. *Zauderer*, 471 U.S. at 651. Undoubtedly,

[7] And the State Bar's reference to *Friedman v. Rogers*, 440 U.S. 1, 13 (1979), where this Court held that a state could prohibit the practice of optometry under a trade name, is inapposite for several reasons. First, unlike testimonials which do provide information to the public, trade names have no intrinsic meaning because they convey "no information about the price and nature of services offered . . . " 440 U.S. 12. Second, substantial *evidence* was introduced which demonstrated the deceptive uses of trade names. 440 U.S. 15, n. 13.

the new standards proposed by the State Bar are narrower than the presumption at issue and demonstrate that there is a less burdensome alternative.[8]

The State Bar's contention that the presumption simply requires more and not less information to be presented in an advertisement (Brief of Appellee, pp. 59-64), is illogical. This presumption does not require any disclosure at all; it simply states that no matter what is disclosed, an attorney who utilizes testimonial advertising must demonstrate that such advertising is not false, misleading or deceptive. Again, if, as the State Bar contends, this demonstration is such a "simple matter" (Brief of Appellee, p. 63), the Bar should have no objection to assuming the burden of proof, as the First Amendment commands. *Zauderer*, 471 U.S. at 646 ["the free flow of commercial advertising is grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on the would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."].

B. THE PRESUMPTION VIOLATES DUE PROCESS.

The State Bar has failed to address Appellant's contention that the presumption at issue cannot stand under the rules set forth in *Speiser v. Randall*, 357 U.S. 513 (1958) and its progeny. Since "the man who knows that he must bring forth proof and persuade another of the lawfulness

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[8] And, of course, this Court has mentioned that a preliminary screening of the advertisement by the Bar is a less burdensome means of preventing false, misleading or deceptive advertising. *Shapero v. Kentucky Bar Association*, ___ U.S. ___, 108 S.Ct. 1916, 1924 (1988).

of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens" (*Id.* at 562), the presumption at issue effectively operates as an outright ban. Brief of Appellant, pp. 41-45. But as stated in *In re R.M.J.*, 455 U.S. 191, 203 (1982), "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive."

The State Bar's contention that this is a "civil" matter and, therefore, the "constitutional validity of presumptions affecting the burden of proof is whether a rational connection exists between the fact proved . . . and the presumed fact . . . " (Brief of Appellee, p. 65) is patently wrong for several reasons. State Bar disciplinary matters are *quasi-criminal, not civil. In re Ruffalo*, 390 U.S. 544, 551 (1968).

Additionally, under California law, the presumption that testimonial advertising is false, misleading or deceptive is a mandatory presumption. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979). The effect of the presumption is as follows: Once the State Bar demonstrates that the advertisement is a testimonial, unless the accused attorney introduces evidence demonstrating that the testimonial is not false, deceptive or misleading. 2 Jefferson, *California Evidence Benchbook* (2d Ed. 1982), Section 46.3. As stated in *McCandless v. Beyer*, 835 F.2d 58, 60 (3d Cir. 1987):

> "In assessing the constitutionality of a mandatory presumption, a court must determine whether the coincidence of facts is *compelled* by the course of human experience. See *Ulster County Court v. Allen*, 442 U.S. 140, 159-60, 99 S.Ct. 2213, 2226, 60 L.Ed.2d 777 (1978)." Emphasis added.

Certainly, the authorities cited herein and in the Brief of Appellant demonstrate that the alleged misleading nature of testimonial advertising is *not* a conclusion compelled by the course of human experience and is *not* even "more likely than not." *Leary v. United States*, 395 U.S. 6, 36 (1969). In any event, the State Bar has failed to present "available, pertinent data" which supports the rationality of the presumption. *Id.* at 38.

V.

THE ADVERTISEMENT IN QUESTION, UNLIKE THE USUAL COMMERCIAL MESSAGE, DID NOT SEEK TO INDUCE THE PURCHASE OF A PRODUCT OR SOLICIT THE IMMEDIATE RETENTION OF A LAWYER. IT MERELY INVITED THE CLIENT TO COME TO THE LAWYER'S OFFICE FOR A FREE CONSULTATION, WHERE ANY AND ALL QUESTIONS WOULD BE ANSWERED.

The advertisement involved in this case did not have the potential for abuse as most commerical advertisements. Most advertisements seek to induce the reader or listener to go to a store and make a purchase. The consumer usually makes the choice based on nothing more than the information contained in the ad, and nothing stands between the information contained in the ad and the purchase itself.

Here, the prospective consumer was afforded a much greater measure of protection. Oring's ad, as best it could in the limited amount of time allowed for a radio commercial, advised listeners that if they had an automobile accident or if they were harassed by an insurance company thereafter, they could have a *free* consultation. Thus, unlike most commercial messages which induce a purchase directly, Oring's message offered a free consultation at which time all the applicable facts and law could be fully discussed with the potential client and any and

all questions could be answered. It was the free consultation with the potential client that was of far greater importance than the ad which brought him there.[9] If, at the consultation, there were any falsehoods, misrepresentations or failures to disclose information, the lawyer would then not only be justifiably subjected to disciplinary proceedings but liable to an action for malpractice or fraud.

VI.

SINCE THE STIPULATIONS ENTERED INTO BETWEEN ORING AND THE STATE BAR WERE NOT ADHERED TO BY THE STATE BAR AND THE RECOMMENDED DISCIPLINE WAS REJECTED AND, IN FACT, INCREASED, APPELLANT CANNOT HAVE WAIVED HIS RIGHT TO APPEAL. FURTHER, THE STATE BAR'S OWN ACTIONS IN ADVISING ORING THAT HE COULD SEEK REVIEW PRECLUDE THE BAR FROM CONTENDING THAT REVIEW WAS WAIVED.

The State Bar contends that Oring may not prosecute this Appeal because he entered into two stipulations (Jurisdictional Statement Appendix "D," pp. 8-11; Jurisdictional Statement Appendix "E," pp. 12-13) and because the California Supreme Court did not impose

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[9] Contrast the ad here, which invited the listener to come in for a free consultation at a time to be chosen by the listener, with the conduct of the lawyer in *Ohralik v. Ohio State Bar Association*, 436 U.S. 445 (1978) who appeared uninvited at the home of an injured 18 year old girl, and obtained her beside authority to represent her after previously having obtained a hospital-bed retainer agreement from another 18 year old who was then lying in traction.

greater discipline than was stipulated to by the parties. Brief of Appellee pp. 85-92.[10]

The State Bar, itself, failed to honor the stipulations and adhere to the recommended discipline. The first stipulation dated December 5, 1984 (Jurisdictional Statement Appendix "D," pp. 8-11) provides, in paragraph "D" that "[i]t is *recommended* that Respondent Mark Oring be *admonished* . . . " Emphasis added.[11]

Thus, the State Bar did not abide by the terms of the Stipulation and indeed notified Oring that he was publicly reproved and that he could seek review by the California Supreme Court (Joint Appendix, "E", pp.

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[10] The Brief for Appellee fails to address the fact that courts indulge in every reasonable presumption against waiver of fundamental rights and that under California law counsel cannot waive appeal rights on behalf of a client. Brief of Appellant pp. 45-46. Moreover, neither the record nor the stipulations express the fact that Oring was giving up his right to review. Presuming waiver from a silent record is impermissible. *Carnley v. Cochran*, 369 U.S. 506 (1962).

[11] Both the Brief of Appellant and the Brief of Appellee are in error with respect to the langauge of the Stipulation. Appellant's Brief at p. 8 errs in stating that "[T]he parties agreed to a punishment consisting of a public reproval . . . " Appellee's Brief at p. 90 states that "[T]he California Supreme Court did not impose greater discipline than was stipulated by the parties." As a matter of fact, the stipulation provided for an "admonition" and not a "public reproval", which, as we shall demonstrate, is a more professionally devastating form of discipline.

18-19).[12] It should, therefore, be estopped to claim that Oring waived or abandoned his right to appeal either to the Supreme Court of California or to this Court.

Moreover, even assuming, *arguendo*, that the State Bar did impose the discipline that the parties had bargained for in the stipulation, Oring does not, as the State Bar claims, seek to evade or escape from his stipulations. Of course, he is bound by the factual stipulations. He has never sought to deny the *facts* stipulated therein, i.e., the words of the advertisement itself and the *fact* that it was truthful. He merely seeks, as any attorney may seek, review of the cause. The State Bar's reliance upon *Duggan v. State Bar*, 17 Cal.3d 416 (1976), *Giovanazzi v. State Bar*, 28 Cal.3d 465 (1980) and *Innis v. State Bar*, 20 Cal. 3d 552 (1978) (Brief of Appellee, p. 90) is grossly misplaced and Appellee's Brief misstates the holdings of those cases. *Giovanazzi* and *Innis* are very explicit in holding that an attorney is bound by *factual* recitals in a stipulation, and that the stipulated *facts* may not be contradicted. 28 Cal.3d 465 at 470; 20 Cal.3d 552 at 555. Yet the right to

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[12] While an "admonition" shall otherwise not be made public and does not constitute imposition of discipline upon a lawyer, (Rules of Procedure of the State Bar, Rule 415) the "public reproval" which ultimately was administered, does constitute discipline against the lawyer, may be made public, and is published in "California Lawyer" for the entire profession to see (Rules of Procedure of the State Bar, Rule 615). Thus, a "public reproval" could adversely affect one's chances for a judicial appointment while an "admonition" cannot. Additionally, the "public reproval", unlike the "admonition", subjects the lawyer to more severe sanctions in the event of any subsequent discipline. *Rules of Procedure of the State Bar, Standards for Attorney Sanctions for Misconduct*, Standards 1.7(a) and 1.7(b); Brief of Appellant, p. 42.

seek review was not foreclosed in *Duggan*, *Giovanazzi* or *Innis*, and indeed review was granted in each of those cases and the issue of culpability and punishment were discussed and decided by the California court.

In *Duggan*, the lawyer stipulated that his conduct involved "moral turpitude," and the Court held that, in State Bar proceedings, stipulations "are conclusive as to the *facts* contained therein." 17 Cal.3d 416 at 422; emphasis added. It also conducted its own independent review of Duggan's conviction which compelled it to hold that Duggan's crime had involved moral turpitude. Again, review was not foreclosed in *Duggan*.

Most recently, in *Smith v. State Bar*, 38 Cal.3d 525, 535 (1985), the California Supreme Court stated "[w]hen this court is considering harsher discipline 'fundamental fairness seems to require us to relieve an attorney from the legal conclusions to which he may have agreed . . . ' "

Since harsher discipline than that recommended by the stipulations was imposed, Appellant should be, and is, relieved from the legal conclusions that he agreed to.

Finally, since it is clear that the Hearing Panel of the State Bar can only *recommend* discipline to the Review Department of the State Bar Court, which in turn can only *recommend* discipline to the Supreme Court, a lawyer cannot logically be expected to have waived the right to review discipline, the exact degree and severity of which was not yet known at the time that the stipulations were entered into.[13]

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[13] There was thus never any reason for Oring to seek to have the stipulations set aside as the State Bar claims he should have done. Brief of Appellee, pp. 91-92. Since the stipulations were binding only as to the *facts*, and not as to the question of whether discipline was warranted or, if so, the nature and extent thereof, the question of discipline always remained open to review.

VII.

CONCLUSION

The State Bar's position, if upheld by this Court, would represent a radical departure from the long-established constitutional principles governing commercial speech.

Most fundamentally, the State Bar challenges the essential First Amendment and due process protections recognized in *Speiser v. Randall* and reaffirmed in *Friedman v. Maryland*, 380 U.S. 51 (1965) and more recently in *Zauderer*, that the burden of proving speech unprotected must be assumed by the would-be regulator or censor. The contrary rule, advocated by Appellee, operates to chill and deter protected speech, to the detriment of the free flow of ideas and information.

The State Bar's purpose of protecting the public from false, misleading or deceptive attorney advertising is a laudable goal. In adopting the amended version of this regulation, which allows the attorney-advertiser to avoid this onerous presumption by adding a small disclaimer, the State Bar has acknowledged that its perfectly legitimate interest may be achieved by a less restrictive means. The presumption applied to Oring, in contrast, both violates the constitutional requirement of narrowly-tailored regulation of speech, and disserves the public interest. Appellant therefore respectfully urges this Court to declare this presumption invalid under the First and Fifth Amendments and to reverse the judgment below.

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Respectfully submitted,

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